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A TREATISE

ON

THE LAW OF JUDGMENTS

INCLUDING THE DOCTRINE OF RES JUDICATA

By HENRY CAMPBELL BLACK, M. A.
Author of "Black's Law Dictionary" and of Treatises on "Tax Titles," "Constitutional Law," "Interpretation of Laws," "Bankruptcy," etc.

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PART I. ORIGIN AND GENERAL PRINCIPLES OF THE DOCTRINE OF RES JUDICATA.

§ 500. Basis of the Doctrine of Res Judicata.

That the solemn and deliberate sentence of the law, pronounced by its appointed organs, upon a disputed fact or state of facts, should be regarded as a final and conclusive determination of the question litigated, and should forever set the controversy at rest, is a rule common to all civilized systems of jurisprudence. But it is more than a mere rule of law. It is more even than an important principle

of public policy. It is not too much to say that this maxim is a fundamental concept in the organization of every jural society. For unless every judgment should at some point become final, and have the quality of establishing its contents as irrefragable truth, litigation would become interminable, the rights of parties would be involved in endless confusion, the courts, stripped of their most efficient powers, would become little more than advisory bodies, and thus the most important function of government—that of ascertaining and enforcing rights—would go unfulfilled. At no period of judicial history have the courts been insensible of these facts. From the earliest times they have steadily adhered to the rule of the conclusiveness of judgments. Out of the multiplicity of controversies that have come before them, presenting a thousand minute shades of difference, they have framed continually more and more detailed rules for the application of the main principle. In this way, by perpetual classification and sub-division, the jurisprudence of the subject has attained a breadth, a depth, and a closeness of texture, which would seem to promise an immediate precedent for the decision of any imaginable case. It would be useless to recapitulate the eulogiums which courts and judges have lavished upon this most salutary doctrine. It is so firmly rooted as a cardinal principle of our legal system, that he who praises its wisdom or its beneficent effects, praises the law itself. But it is important to inquire a little more closely into its technical relations to some other parts of our jurisprudence. The principle of the conclusiveness of judgments has been classified, through a very long period of English law, as a branch of the doctrine of estoppel. That is, the first division of that doctrine, viz., estoppel by record, includes as well the judgments of courts as the records of legislative and other public bodies. If the term estoppel is to be taken in its ancient sense, as denoting the preclusion of a man, by reason of his previous acts or conduct, to speak the truth, it is obvious that this classification is objectionable. For if the purpose of judicial proceedings is to ascertain and declare the truth, then the effect of a judgment is to forbid a man to deny the truth. Other defects in the analogy will readily present themselves to the mind and need not be enlarged upon here. But if it be well understood that the real point of resemblance between the conclusive

effect of a judgment and a genuine estoppel of the technical sort is that each excludes any contradictory evidence, then no harm is done in classing them together, and no attempt to break away from the old terminology is necessary. Historically it would be going too far to say that the English rules on this subject have been derived from the doctrine of res judicata in the Roman law. In each country the importance of the principle, as a sound maxim of public policy, was early recognized, and the rules were gradually developed to keep pace with the increasing complexity of civilization. But that English and American judges have greatly profited by exploring the rules of the civil law in this regard must be plain to the most cursory observer. That system, so admirable in its harmonious and consistent development, has commended itself to the judicial understanding no less in this field of inquiry than in many others. The very fact of the adoption and naturalization of the phrase "res judicata" in our legal language is evidence of this. And our further investigations will disclose many additional proofs of the assistance our jurisprudence has thus derived from the older body of law. As there will be frequent occasion to cite the Roman writers in the following pages, it will be well to add a brief account of the doctrine of res judicata as they held it.

§ 501. In the Roman Law.

According to the practice of the Roman law, as it was administered by the prætor, a defendant might repel the plaintiff's claim not only by a direct contradiction of the facts out of which it was alleged to arise, and not only by pleading facts (such as payment) which of themselves extinguished the right of action, though admitting it to have been originally valid, but also by showing such facts as might induce the prætor, on equitable grounds, to declare certain defenses admissible, the effect of which, if established, would be, not indeed to destroy the action ipso jure, but to render it ineffectual by means of the "exceptio" thus allowed. An exception therefore resembled our plea in "confession and avoidance" only to the extent that it avoided the action, though without confessing it. Among these exceptions was the "exceptio rei judicatæ," or plea of former judgment. The name res judicata was given to any claim, defense, or disputed

question which had been passed upon and determined by the definitive sentence of a court or judge. Of such a matter it was said, "transit in rem judicatam." And such a sentence, in respect to the points decided by it, was binding and conclusive upon the parties and could not be contradicted or impeached by them, as was expressed by the well-known maxim, "Res judicata pro veritate accipitur."[1] The exception to which we have referred was therefore in effect a plea that the matters stated by the plaintiff had already passed into judgment, and for that reason could not be again litigated or controverted. But in order to produce this effect it was necessary that the previous judgment should have been upon the very same point and between the same parties. "Et generaliter (ut Julianus definit) exceptio rei judicatæ obstat, quotiens inter easdem personas eadem quæstio revocatur, vel alio genere judicii."[2] Such was the general nature of the principle and its effects. Of course there were a multitude of subsidiary rules directing its application to particular sets of circumstances, but these are foreign to our present purpose. Such of the secondary rules as present analogies to the provisions of our own law, or throw light upon the latter, will be considered in their proper connection.

§ 502. Modern European Systems.

In those countries which have modelled their jurisprudence upon the pattern of the civil law, the important doctrine of res judicata has been adopted with its main features unchanged from the aspect they wore in the age of the Antonine jurists.[3] The same rules, for example, still obtain in regard to the necessary identity of the parties and the subject-matter. Thus, in the Civil Code of France, it is said: "The authority of the thing adjudged (chose jugée) has place only in regard to that which has constituted the object of a judgment. It is necessary that the thing demanded be the same; that the demand be founded upon the same cause; that the demand be be-

[1] Dig. 1, 5, 25. See Broom, Leg. Max. 327; Gaius, 4, 106.
[2] Dig. 44, 2, 7, 4.
[3] See Tomk. & J. Comp. 94.

tween the same parties, and formed by and against them in the same capacity." [4]

§ 503. In Anglo-American Jurisprudence.

This great principle of the conclusiveness of judgments is firmly imbedded in the jurisprudence of England. Though recognized with more or less distinctness from very early times, it was never so satisfactorily stated as in the great case of the Duchess of Kingston,[5] where Chief Justice De Grey declared the rule to be that "the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court." This language, from being constantly quoted with approbation, has acquired almost the force of a statute. Another early and leading case upon the general subject is one decided by Lord Ellenborough,[6] wherein he said: "It is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, that creates the estoppel. The recovery itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact which, having been once distinctly put in issue by them, or by those to whom they are privy in estate or law, has been, on such issue joined, solemnly found against them." That the same principle is equally recognized in our own country could be made apparent by a multitude of citations. It would be idle, however, to adduce authorities in support of a proposition so familiar, and we are content merely to quote from one or two opinions in which its reasons or importance have been especially well stated. In a leading case in Massachusetts, Chief Justice Shaw observed: "It is a principle lying at the foundation of all well conducted jurisprudence, that when a right or a fact has been judicially tried and determined by a court of competent jurisdiction, the judgment thereon, so long as it remains unreversed, shall be conclusive

[4] Section 1351.
[5] 20 How. St. Tr. 355; 2 Smith, Lead. Cas. *424.
[6] Outram v. Morewood, 3 East, 346.

upon the parties and those in privity with them in law or estate. The ground of such principle, we think, when rightly understood, is, that it presents evidence of a fact of so high a nature that nothing which could be proved by evidence aliunde would be sufficient to overcome it; and therefore it would be useless for a party, against whom it can be properly applied, to adduce any such evidence, and accordingly he is estopped or precluded by law from doing so. Such is the character of an estoppel by record, as in case of an issue on a question of fact judicially tried and decided." [7] Still more emphatic is the testimony of the federal supreme court to the inviolability of this principle. In the case selected for citation the remarks of the learned judge were specifically directed to the legal system of Louisiana, but his observations will apply with equal truth to any of the United States. He said: "Under the system of that state, the maintenance of public order, the repose of society, and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is this principle implanted in her jurisprudence that commentators upon it have said that res judicata renders white that which is black, and straight that which is crooked. 'Facit ex curvo rectum, ex albo nigrum.' No other evidence can afford strength to the presumption of truth it creates, and no argument can detract from its legal efficacy." [8]

§ 504. The Rules Stated.

After these preliminary observations we are prepared to state categorically the two main rules which govern the subject of estoppel by judgment, as the same may be deduced from the general result of all the authorities. The first of these chief rules is as follows: A point which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, cannot be again drawn in question in any future action between the same parties or their privies, whether the causes of action in the two suits be identical or different.[9] As stated

[7] Sawyer v. Woodbury, 7 Gray (Mass.) 499, 66 Am. Dec. 518.

[8] Jeter v. Hewitt, 22 How. 352, 16 L. Ed. 345, Campbell, J.

[9] Aislin v. Parkin, 2 Burr. 665; Outram v. Morewood, 3 East, 346; Hopkins

by the supreme court of the United States: "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue, and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and, even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their

v. Lee, 6 Wheat. 109, 5 L. Ed. 218; Smith v. Kernochen, 7 How. 198, 12 L. Ed. 666; Parrish v. Ferris, 2 Black, 606, 17 L. Ed. 317; Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 41 L. Ed. 312; Southern Minnesota Railway Extension Co. v. St. Paul & S. C. R. Co., 5 C. C. A. 249, 55 Fed. 690; Society v. Hartland, 2 Paine, 536, Fed. Cas. No. 13,155; Campbell v. Strong, 1 Hempst. 265, Fed. Cas. No. 2,367a; Divoll v. Atwood, 41 N. H. 443; Hollister v. Abbott, 31 N. H. 442, 64 Am. Dec. 342; Towns v. Nims, 5 N. H. 259, 20 Am. Dec. 578; Gregory v. Pike, 94 Me. 27, 46 Atl. 793; Spencer v. Dearth, 43 Vt. 98; Sawyer v. Woodbury, 7 Gray (Mass.) 499, 66 Am. Dec. 518; Colt v. Tracy, 8 Conn. 268, 20 Am. Dec. 110; Dennison v. Hyde, 6 Conn. 508; Church v. Leavenworth, 4 Day (Conn.) 274; Betts v. Starr, 5 Conn. 550, 13 Am. Dec. 94; Wright v. Butler, 6 Wend. (N. Y.) 284, 21 Am. Dec. 323; Burhans v. Van Zandt, 7 N. Y. 523; Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350; Williamsburgh Sav. Bank v. Town of Solon, 136 N. Y. 465, 32 N. E. 1058; Hyatt v. Bates, 35 Barb. (N. Y.) 308; Burt v. Sternburgh, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402; Gardner v. Buckbee, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256; Finley v. Hambest, 30 Pa. 190; Lentz v. Wallace, 17 Pa. 412, 55 Am. Dec. 569; Smith v. Smith, 55 N. J. Eq. 222, 37 Atl. 49; Whitehurst v. Rogers, 38 Md. 503; Currie v. Chowning (Va.) 21 S. E. 809; Harrison v. Walton's Ex'r, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; Moore v. Garner, 109 N. C. 157, 13 S. E. 768; Willoughby v. North Eastern R. Co., 52 S. C. 166, 29 S. E. 629; La Motte v. Harper, 88 Ga. 26, 13 S. E. 804; Mervine v. Parker, 18 Ala. 241; Wall v. Wall, 28 Miss. 409; Montesquieu v. Heil, 4 La. 51, 23 Am. Dec. 471; Foster v. Wells, 4 Tex. 101; Carson v. McCormick Harvesting Mach. Co., 18 Tex. Civ. App. 225, 44 S. W. 406; Estill v. Taul, 2 Yerg. (Tenn.) 466, 24 Am. Dec. 498; Sanford v. Oberlin College, 50 Kan. 342, 31 Pac. 1088; Peay v. Duncan, 20 Ark. 85; Grant v. Ramsey, 7 Ohio St. 157; Babcock v. Camp, 12 Ohio St. 11; Hixson v. Ogg, 53 Ohio St. 361, 42 N. E. 32; Hargus v. Goodman, 12 Ind. 629; Webber v. Mackey, 31 Ill. App. 369; Reynolds v. Mandel, 73 Ill. App. 379; Heichew v. Hamilton, 4 G. Greene (Iowa) 317, 61 Am. Dec. 122; Street v. Beckman, 43 Iowa, 496; Offutt v. John, 8 Mo. 120, 40 Am. Dec. 125; Wales v. Lyon, 2 Mich. 276; Barker v. Cleveland, 19 Mich. 230; Johnson v. Johnson, 57 Minn. 824, 58 N. W. 824; Chase v. Miles, 43 Neb. 686, 62 N. W. 35; Dillon v. Chicago, K. & N. R. Co., 58 Neb. 472, 78 N. W. 927; Upton v. Betts, 59 Neb. 724, 82 N. W. 19; Jackson v. Lodge, 36 Cal. 37; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187.

privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."[10] The second of the main rules on the subject may be thus stated: A judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit, between the same parties or their privies, upon the same cause of action, so long as it remains unreversed.[11] Or, as otherwise phrased: "The doctrine of res judicata is plain and intelligible, and amounts simply to this, that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterward be litigated by new proceedings either before the same or any other tribunal."[12]

§ 505. Judgment can be Nothing less than Conclusive.

It is important to be observed in this connection that a judgment, when offered as evidence in a subsequent litigation, is either conclusive evidence, suffering no contradiction, or it is of no effect at all; and it is not admissible as evidence of the matters on which it is based except where it is conclusive. That is to say, it can never be admissible as tending to prove a given fact; for if it is offered as against a stranger to the former litigation it is not admissible at all, and if against a party or privy it is conclusive.[13]

[10] Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355.

[11] Young v. Black, 7 Cranch, 567, 3 L. Ed. 440; Ramsey v. Herndon, 1 McLean, 450, Fed. Cas. No. 11,546; Hughes v. Blake, 1 Mason, 515, Fed. Cas. No. 6,845; Fish Bros. Wagon Co. v. Fish Bros. Mfg. Co., 37 C. C. A. 146, 95 Fed. 457; Linton v. National Life Ins. Co., 44 C. C. A. 54, 104 Fed. 584; Woodbury v. Portland Marine Soc., 94 Me. 122, 46 Atl. 797; Smith v. Whiting, 11 Mass. 445; Gardner v. Buckbee, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256; Rice v. King, 7 Johns. (N. Y.) 20; Baker v. Rand, 13 Barb. (N. Y.) 152; Kent v. Hudson River R. Co., 22 Barb. (N. Y.) 278; Beall v. Pearre, 12 Md. 550; Jones v. Wetherbee, 4 Strob. (S. C.) 50, 51 Am. Dec. 653; Thornton v. Eppes, 6 Fla. 546; Hayden v. Boothe, 2 A. K. Marsh. (Ky.) 353; Trammell v. Thurmond, 17 Ark. 203; Housemire v. Moulton, 15 Ind. 367; Bougher v. Scobey, 21 Ind. 365; Gray v. Gillilan, 15 Ill. 453, 60 Am. Dec. 761; McKnight v. Taylor, 1 Mo. 282; Chase v. Swain, 9 Cal. 130.

[12] Foster v. The Richard Busteed, 100 Mass. 412, 1 Am. Rep. 125.

[13] Bethlehem v. Watertown, 51 Conn. 490. Compare Clapp's Ex'rs v. Branch, 11 Tex. Civ. App. 203, 32 S. W. 735.

§ 506. Difference between Conclusiveness of Judgment and Bar by Former Recovery.

In a former section we stated that there were two main rules of law on the subject of res judicata. This was done for the purpose of marking a sharp distinction between the principles governing the two typical cases in which a judgment may be offered as evidence. For first, it may be brought forward as evidence of some one particular point which is involved in a different litigation between the same parties. Or secondly, it may be offered as a bar to the whole action, on the ground that it is a determination, previously had between the parties, of the same controversy. Now these two cases are distinguished by important changes in the rule; in so much that they suggest a clear line of cleavage for the logical division of the general subject, and a principle for the classification of the multitude of authorities. In speaking of the former case, we use the phrase "conclusiveness of the judgment;" in referring to the latter, we shall employ the term "bar by former judgment." The differences between the two cases are found chiefly in two regards, viz.: as respects the identity of the subject-matter in the successive suits, and as respects the scope of the estoppel, as to the matters determined by it. In the first place, if the former judgment is offered as evidence on a particular point, it is immaterial that the causes of action in the two suits are different, but it is necessary that that point should have constituted an issue in both suits. "The principle will be found to run through nearly all the American cases, that the judgment of a court of competent jurisdiction directly upon a particular point is, as between the parties, conclusive in relation to such point, though the purpose and subject-matter of the two suits be different; hence a judgment may not only be evidence, but conclusive evidence, in relation to such point, and still be no bar, strictly and technically speaking, to a second action." [14] For example, where it was necessary, to the plaintiff's right to recover, in the former suit, that he should

[14] Spencer v. Dearth, 43 Vt. 98, 105; Lindsey v. Town of Danville, 46 Vt. 144; Beloit v. Morgan, 7 Wall. 619, 19 L. Ed. 205; Merriam v. Whittemore, 5 Gray (Mass.) 316; Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350; Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L.

prove the defendant to have been a member of a certain firm at a specified time, the judgment will be conclusive evidence of that fact in a subsequent suit between the same parties on an entirely different cause of action.[15] In the second place, there is an important difference as to the matters determined by the former judgment. This point has been treated at large in an opinion of the United States supreme court written by Mr. Justice Field. Said the learned judge: "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.[16] Thus for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having

Ed. 355; Stuffiebeam v. De Lashmutt, 101 Fed. 367; Taylor v. Taylor, 26 Abb. N. C. 360, 14 N. Y. Supp. 420; Stevens v. Wadleigh (Ariz.) 57 Pac. 622.

[15] Lynch v. Swanton, 53 Me. 100.

[16] See McAlcer v. Lewis, 75 Fed. 734; Lawrence v. Stearns, 79 Fed. 878; Wentworth v. Racine County, 90 Wis. 26, 74 N. W. 551.

passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever. But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." [17] It is said, in regard to the latter of the two cases supposed, "this species of estoppel is known to the law as an estoppel by verdict, and is equally available to a plaintiff in support of his action, when the circumstances warrant it, as when offered by a defendant as matter of defense." [18] It is scarcely accurate, however, to speak of an estoppel "by verdict," since a verdict alone, without a judgment upon it, is of no force in this direction, and it is the judgment alone which, in any case, creates the estoppel.

§ 507. Scope of this Chapter.

In the present chapter we propose to discuss only the first branch of the main subject as indicated above, viz., the effect of a judgment as evidence in a second and different controversy. The effect of a judgment as a bar to a second suit is reserved for the next succeed-

[17] Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195. To the same effect, see Nesbit v. Independent District of Riverside, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562; Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 13 Sup. Ct. 72, 36 L. Ed. 972; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; Board of Com'rs of Lake County v. Sutliff, 38 C. C. A. 167, 97 Fed. 270; Chicago, R. I. & P. Ry. Co. v. St. Joseph Union Depot Co., 92 Fed. 22; City of Paterson v. Baker, 51 N. J. Eq. 49, 26 Atl. 324; Slater v. Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444; Noyes v. Belding, 6 S. D. 629, 62 N. W. 953; Radford v. Folsom, 3 Fed. 199; Laird v. City of De Soto, 32 Fed. 652; Foye v. Patch, 132 Mass. 105; Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608; Jones v. Commercial Bank, 78 Ky. 413.

[18] Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608.

ing chapter. The distinction between judgments in rem and judgments in personam, and between domestic and foreign judgments, is also postponed to later chapters. At present we speak only of domestic judgments in personam, and of their conclusiveness upon the points or issues determined by them.

PART II. WHAT JUDGMENTS ARE CONCLUSIVE.

§ 508. Character of the Adjudication.

The principle of the rule as to res judicata, except in the case of mere subsidiary motions and some other instances, has no reference to the form or the object of the litigation in which the particular fact is determined which is thenceforth to be deemed established as between the parties to the dispute. The form or object of the prior litigation does not alter the conclusive effect of the judgment or decision.[19] For instance, where the rights of a party are fully determined upon exceptions to a sheriff's return on sale of real property under execution, the decision is as conclusive as any other judgment.[20] The essential thing is that there should have been a judicial determination of rights in controversy, with a final decision thereon. Mere findings of fact by a court, upon which no judgment has been entered, though directed, do not constitute a judgment nor raise an estoppel.[21] So, a decision by a court of equity that it will not interfere between the parties, but will leave them to their legal remedies, determines nothing with respect to their rights in any such sense as to be binding upon them in a subsequent action at law.[22] Again, an

[19] In re Roberts, 59 How. Prac. 186.

[20] Comm. v. Comrey, 174 Pa. 355, 34 Atl. 581. But an order allowing execution to issue upon a judgment against a deceased defendant, on the ground that he had fraudulently conveyed his property, is not conclusive upon the question whether the conveyance was fraudulent. In re Holmes, 131 N. Y. 80, 29 N. E. 1003.

[21] Child v. Morgan, 51 Minn. 116, 52 N. W. 1127. A special finding in an equitable action, distinct from the judgment, and made to facilitate the taking of an appeal, is not conclusive in any collateral suit, except so far as resort may be had to it to explain the scope of the judgment. Kashman v. Parsons, 70 Conn. 295, 39 Atl. 179.

[22] Lewis v. Baker, 151 Pa. 529, 25 Atl. 99. But the refusal of a court, when within its equitable discretion, to award costs or disbursements to a

order auditing and settling a claim against a municipality is not a judicial act, though performed by a court under statutory authority.[23] Further, as we shall see more fully in a later section, a judgment is not conclusive upon matters which were collaterally drawn in question, or were only incidentally considered by the court.[24] Thus, a decision, in contempt proceedings, that a certain device is not an infringement of a patent, is not an estoppel in a subsequent suit between the same parties for infringement by the manufacture or use of the same device.[25]

On the other hand, the application of the doctrine of res judicata is not affected by the fact that the amount in controversy in the former suit was so small as to prevent the defeated party from securing a review of the judgment by an appellate court.[26] Nor is it always necessary that the former judgment should have been in favor of the party who afterwards invokes it as an estoppel. Thus, where the owner of real property brings an action to set aside a contract for the sale of the land, alleging that it constitutes a cloud on his title, a decree dismissing his complaint on the ground that the contract was void, and therefore constituted no cloud, is a bar to a subsequent action against him for the specific performance of the contract.[27] Neither is it necessary that a former judgment, set up as an estoppel, should have been rendered upon an actual trial of the case. A judgment by default is just as conclusive between the parties, upon all matters necessary to support the judgment, as one rendered after

successful party, is an adjudication which precludes him from maintaining an independent action for their recovery. Munson v. Straits of Dover S. S. Co., 99 Fed. 787.

[23] Sears v. Stone County, 105 Mo. 236, 16 S. W. 878, 24 Am. St. Rep. 378.

[24] Infra, § 611.

[25] Mack v. Levy, 59 Fed. 468. A judgment rendered in another state, in habeas corpus proceedings for the custody of a child, is not conclusive where there has been a material change of conditions and circumstances. In re Barnes, 30 Wkly. Law Bul. (Ohio) 164.

[26] Johnson Steel Street Rail Co. v. William Wharton & Co., 152 U. S. 252, 14 Sup. Ct. 608, 38 L. Ed. 429. The failure of the prevailing party to appeal from part of a decree against him seemingly inconsistent with the part favorable to him does not affect his rights under the decree, there being nothing in the pleading to justify such unfavorable portion. Custer v. Russey (Tenn. Ch. App.) 51 S. W. 126.

[27] Gordon v. Johnson, 3 Colo. App. 139, 32 Pac. 347.

answer and contest.[28] So also, a judgment entered by consent or agreement of the parties, operates as an estoppel between them, as much as a judgment arrived at by the court after exercising its mind upon the matters in controversy.[29] But to create an estoppel, it is essentially necessary that there be a genuine and honest judgment. It must not be merely collusive or simulated. A judgment or sentence, we are told, "is a judicial determination of a cause agitated between real parties, upon which a real interest has been settled. In order to make a sentence, there must be a real interest, a real argument, a real prosecution, a real defense, a real decision. Of all these requisites, not one takes place in the case of a fraudulent and collusive suit. There is no judge; but a person invested with the ensigns of a judicial office is misemployed in listening to a fictitious cause proposed to him; there is no party litigating, there is no party defendant, no real interest brought into question." [30]

§ 509. Judgment must be Final.

It is well settled that the doctrine of res judicata applies only to final judgments, not to interlocutory judgments or orders which the court which rendered them has power to vacate or modify at any

[28] Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859. See, infra, § 697.

[29] In re South American & Mexican Co., 1 Ch. 37, 12 Rep. 1; Lemmon v. Osborn, 153 Ind. 172, 54 N. E. 1058; West Philadelphia Pass. Ry. Co. v. Philadelphia & W. Turnpike-Road Co., 186 Pa. 459, 40 Atl. 787. Where the liability is several, and not joint, a decree against one of several defendants, upon a trial by agreement of the issues affecting him only, is final as to such defendant, though the suit is continued as to the other parties. Minneapolis Trust Co. v. Verhulst, 74 Ill. App. 350. But a decree entered by consent is not res judicata on a subsequent bill to carry it into execution by enforcing it against a successor of the former defendant. Lawrence Mfg. Co. v. Janesville Cotton Mills, 138 U. S. 552, 11 Sup. Ct. 402, 34 L. Ed. 1005.

[30] Earl of Bandon v. Becher, 3 Clark & F. 510; Town of Andes v. Ely, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. Ed. 996; Central Trust Co. v. Bridges, 6 C. C. A. 539, 57 Fed. 753; Thomas v. McDaneld, 88 Iowa, 374, 55 N. W. 499; Shannon v. Shannon, 4 Allen (Mass.) 134. But it is proper for a court to give full faith and credit to a judgment of a domestic court of co-ordinate jurisdiction, fair on its face, though the judgment was in fact fraudulent. Bruce v. Osgood, 154 Ind. 375, 56 N. E. 25.

time.[31] This principle is also an accepted doctrine of the modern Roman law.[32] It is true that, so far as concerns the further prosecution of the same case, an interlocutory judgment for the plaintiff (as, upon a default, where the damages remain to be assessed) determines every fact alleged in the declaration which, but for such judgment, the plaintiff would have to prove to establish his right to recover, and precludes the parties from introducing any evidence to enlarge, lessen, or defeat the right so determined.[33] Also, where a decree in equity passes upon the issues between the parties, and finally determines their rights in respect to the main facts in controversy, or the principal object of the action, though it orders a reference as to specific items, or reserves a right to apply for further relief, or continues the cause for such further action as may prove to be necessary, it is conclusive as to the matters judicially and finally determined, though the reserved or postponed questions may still be open.[34] Again, a decree is none the less conclusive because it was merely interlocutory at the time of instituting the suit in which it is set up as a bar, where it subsequently ripened into a final decree.[35] But at the same time, a judgment by default only admits for the purposes of the action the legality of the claim or demand in suit; it does not make the allegations of the declaration or complaint evidence in

[31] McGourkey v. Toledo & O. C. Ry. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079; In re Vetterlein, 44 Fed. 57; Harmon v. Struthers, 48 Fed. 260; Webb v. Buckelew, 82 N. Y. 555; Metropolitan El. Ry. Co. v. Manhattan Ry. Co., 14 Abb. N. C. 215; Collins v. Jennings, 42 Iowa, 447; Clariday v. Reed (Tenn. Ch. App.) 53 S. W. 302; Thompson v. Thompson (Tenn. Ch. App.) 54 S. W. 145; First Nat. Bank v. Linville (Kan. App.) 62 Pac. 165. And see, infra, § 695.

[32] 1 Evans, Poth. Obl. 534.

[33] Morey v. King, 49 Vt. 304; supra, § 91.

[34] See Green v. Bogue, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. Ed. 1061; O'Brien v. Wheelock, 78 Fed. 673; Low v. Low, 177 Mass. 306, 59 N. E. 57; Christie v. Iowa Life Ins. Co., 111 Iowa, 177, 82 N. W. 499; Younkin v. Younkin, 44 Neb. 729, 63 N. W. 31; Lawton v. Perry, 45 S. C. 319, 23 S. E. 53. But it is held that a decree awarding a perpetual injunction in a patent suit, but with an order of reference to a master to ascertain the damages suffered by the infringement, is an interlocutory decree, and not final, and therefore does not operate as an estoppel in a subsequent suit. Brush Electric Co. v. Western Electric Co., 22 C. C. A. 543, 76 Fed. 761.

[35] David Bradley Mfg. Co. v. Eagle Mfg. Co., 6 C. C. A. 661, 57 Fed. 980.

an action upon a different claim.[36] And where there are two conflicting judgments in the same case, the later in point of time must prevail.[37] An order admitting an alien to citizenship is in the nature of a judgment, and is conclusive upon the question of the length of his residence within the United States.[38]

§ 510. Effect of Pending Appeal.

In many of the states it is held that the pendency of an appeal suspends the operation of the judgment in respect to all its usual effects, and hence, the judgment not becoming final while the appeal remains undetermined, it cannot be pleaded in bar, in the interval, nor used in evidence as an estoppel.[39] This seems also to be the view taken in Pennsylvania, where it is said that, as a judgment must be final before it can operate as an estoppel, a decree in admiralty from which an appeal is taken and pending cannot be pleaded in bar.[40] But in several other states the rule is that, although an appeal suspends the operation of the judgment for purposes of execution, still, so long as it remains unreversed, its conclusiveness is not affected by the appeal, and in the meantime it may be pleaded or produced in evidence as if final.[41]

[36] Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195.

[37] Stoltz v. Coward, 10 Tex. Civ. App. 295, 30 S. W. 935.

[38] The Acorn, 2 Abb. U. S. 434, Fed. Cas. No. 29.

[39] Sharon v. Hill (C. C.) 26 Fed. 337; Woodbury v. Bowman, 13 Cal. 634; Murray v. Green, 64 Cal. 363, 28 Pac. 118; Purser v. Cady, 120 Cal. 214, 52 Pac. 489; Sherman v. Dilley, 3 Nev. 21 (compare Rogers v. Hatch, 8 Nev. 35); Day v. De Jonge, 66 Mich. 550, 33 N. W. 527; Haynes v. Ordway, 52 N. H. 284; Small v. Haskins, 26 Vt. 209; Ketchum v. Thatcher, 12 Mo. App. 185; Byrne v. Prather, 14 La. Ann. 653; Glenn v. Brush, 3 Colo. 26; Smith v. Farmers' Bank (Ky.) 51 S. W. 451; Hall v. Calvert (Tenn.) 46 S. W. 1120; Delk v. Yelton, 103 Tenn. 476, 53 S. W. 729; Texas Trunk R. Co. v. Jackson, 85 Tex. 607, 22 S. W. 1030; Maxwell v. First Nat. Bank (Tex.) 24 S. W. 848; Cunningham v. Holt, 12 Tex. Civ. App. 150, 33 S. W. 981; Buckner v. Lancaster (Tex.) 40 S. W. 631. Compare Thompson v. Giffin, 69 Tex. 139, 6 S. W. 410; Westmoreland v. Richardson, 2 Tex. Civ. App. 175, 21 S. W. 167.

[40] Souter v. Baymore, 7 Pa. 415, 47 Am. Dec. 518.

[41] Sage v. Harpending, 49 Barb. (N. Y.) 166; Parkhurst v. Berdell, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384; Stevens v. Stevens, 69 Hun, 332, 23 N. Y. Supp. 520; Mercantile Nat. Bank v. Corn Exchange Bank,

In the practice of the federal courts, the rule appears to be that, when a case removed to an appellate court by a writ of error or appeal is not there tried de novo, but the record made below is simply re-examined, and the judgment either reversed or affirmed, such an appeal or writ of error does not vacate the judgment below, nor prevent it from being pleaded and given in evidence as an estoppel upon issues which were tried and determined, in the absence of a local statute providing that it shall not be so used pending an appeal; a supersedeas bond merely stays process for enforcement of the judgment, and does not vacate the judgment, or change its effect as an estoppel.[42] But it is said that the judgment of the supreme court of a state cannot be pleaded as an adjudication in bar of a subsequent suit in a federal court, where it has been removed for review to the supreme court of the United States by writ of error, and is there pending and undetermined.[43] It should be remarked that the mere fact that a judgment is liable to be appealed from cannot strip it of its conclusive character. It remains in force as final, unless actually suspended by an appeal, and will, in the mean time, be competent evidence in support of a plea in estoppel.[44]

§ 511. Reversed Judgment.

The reversal of a judgment will of course completely destroy its efficacy as an estoppel, since it annuls the very thing which would have made the judgment conclusive, namely the judicial affirmation that the resolution of the issue propounded was in such and such

73 Hun, 78, 25 N. Y. Supp. 1068; Burton v. Burton, 28 Ind. 342; Scheible v. Slagle, 89 Ind. 328; Faber v. Hovey, 117 Mass. 107, 19 Am. Rep. 398; Allen v. Mayor, etc., of City of Savannah, 9 Ga. 286; Moore v. Williams, 132 Ill. 589, 24 N. E. 619, 22 Am. St. Rep. 563; Cloud v. Wiley, 29 Ark. 80; Paine v. Schenectady Ins. Co., 11 R. I. 411; Day v. Holland, 15 Or. 464, 15 Pac. 855; Willard v. Ostrander, 51 Kan. 481, 32 Pac. 1092, 37 Am. St. Rep. 294; Watson v. Richardson, 110 Iowa, 698, 80 N. W. 416, 80 Am. St. Rep. 331; Smith v. Schreiner, 86 Wis. 19, 56 N. W. 160, 39 Am. St. Rep. 869; In re Kirby, 10 S. D. 322, 73 N. W. 92, 39 L. R. A. 856.

[42] Ransom v. City of Pierre, 41 C. C. A. 585, 101 Fed. 665; Oregonian R. Co. v. Oregon R. & Nav. Co. (C. C.) 27 Fed. 277.

[43] Eastern Building & Loan Ass'n v. Welling (C. C.) 103 Fed. 352.

[44] Cook v. Rice, 91 Cal. 664, 27 Pac. 1081.

wise.[45] And the same is true of a judgment or order of the court which has been vacated or revoked; it is stripped of any conclusive character it may have possessed.[46] And an appeal from an order vacating a judgment does not reinstate the judgment so as to give it operation as an estoppel.[47] But the fact that a judgment is liable, under the local statute, to be opened at any time within five years after its entry (as, where it was rendered without any other notice than by publication in a newspaper), will not impair its conclusive force so long as it remains unopened.[48] And it is held that payment of the judgment rendered in a suit for foreclosure, or redemption from the foreclosure sale, does not extinguish the judgment, nor affect its conclusiveness as to the questions tried and determined in the action.[49]

§ 512. Not affected by Motion for New Trial.

The fact that a motion for a new trial is pending and undetermined in the former action does not destroy or in any way affect the operation of the judgment therein rendered as an estoppel, since such a motion does not operate as a supersedeas or stay execution.[50]

[45] Reg. v. Drury, 3 Car. & K. 193; Butler v. Eaton, 141 U. S. 240, 11 Sup. Ct. 985, 35 L. Ed. 713; Commercial Bank v. Sherwood, 162 N. Y. 310, 56 N. E. 834; Smith v. Frankfield, 77 N. Y. 414; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; McCallister v. Bridges (Ky.) 40 S. W. 70; Stewart v. Register, 108 N. C. 588, 13 S. E. 234; Mills County v. Brown County, 10 Tex. Civ. App. 356. 30 S. W. 476; Rosenbaum v. Davis, 106 Tenn. 51, 60 S. W. 497; Pells v. People, 159 Ill. 580, 42 N. E. 784; Mattingly v. Lewisohn, 13 Mont. 508, 35 Pac. 111. And see, infra, § 683.

[46] Graef v. Bernard, 162 Mass. 300, 38 N. E. 503; Small's Appeal (Pa.) 15 Atl. 807.

[47] Hershey v. Meeker County Bank, 71 Minn. 255, 73 N. W. 967.

[48] Stevens v. Reynolds, 143 Ind. 467, 41 N. E. 931, 52 Am. St. Rep. 422.

[49] Ferris v. Udell, 139 Ind. 579, 38 N. E. 180.

[50] Hubbell v. United States, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. Ed. 136; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; Young v. Brehl, 19 Nev. 379, 12 Pac. 564, 3 Am. St. Rep. 892. See infra, § 684. But in Utah, a judgment is not final while a motion for a new trial, made within the time allowed by law, is pending and undisposed of. Snow v. Rich, 22 Utah, 123, 61 Pac. 336. And in Iowa, it is said that a judgment is conclusive as against parties thereto unless grounds exist for a new trial or for equitable interference. Fulliam v. Drake, 105 Iowa, 615, 75 N. W. 479.

§ 513. Voidable and Void Judgments.

In order that a judgment should operate either as a bar to a subsequent action between the parties or as conclusive evidence upon a particular point determined by it, it is necessary that it should be a valid and subsisting adjudication. But here the distinction is to be carefully noted between judgments that are absolutely void and those which are merely voidable for errors in fact or irregularities.[51] The former kind are of no effect whatever, either by way of estoppel or for any other purpose.[52] Hence if the court from which the judgment proceeds had no jurisdiction over the parties to the suit;[53] or if the subject-matter of the controversy was beyond its lawful cognizance;[54] or if, these two elements of jurisdiction being present, it still assumed to go beyond the sphere of the actual litigation, as developed by the pleadings and evidence, and render a judgment or decree upon a matter not in dispute or not submitted to it;[55] in either such case the sentence cannot have the force of res judicata. But where the court has jurisdiction of the subject-matter and the parties, and where jurisdiction attaches in the particular case and authorizes the particular adjudication made, its judgment, although it may be voidable for irregularities, or liable to be reversed or set aside for errors

[51] As to the distinction between void and voidable judgments, see, supra, vol. 1, §§ 170, 215, 218.

[52] Attorney General v. Eriche, 1 Reporter, 440 (1893) App. Cas. 518; Gage v. Hill, 43 Barb. (N. Y.) 44; Hancock v. Flynn, 8 N. Y. Supp. 133; Miller v. Barkeloo, 8 Ark. 318; Agnew v. Adams, 26 S. C. 101, 1 S. E. 414; Dunklin v. Wilson, 64 Ala. 162; Moore v. O'Barr, 87 Ga. 205, 13 S. E. 464; Thaxton v. Smith (Tex. Civ. App.) 38 S. W. 820; Portsmouth Sav. Bank v. Gratiot Circuit Judge, 83 Mich. 646, 47 N. W. 595; In re Smith's Estate, 122 Cal. 462, 55 Pac. 249; In re Christiansen, 17 Utah, 412, 53 Pac. 1003, 41 L. R. A. 504, 70 Am. St. Rep. 794.

[53] Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116; Franz Falk Brewing Co. v. Hirsch, 78 Tex. 192, 14 S. W. 450; Abbott v. Union Mut. Life Ins. Co., 127 Ind. 70, 26 N. E. 153; Sackett v. Montgomery, 57 Neb. 424, 77 N. W. 1083, 73 Am. St. Rep. 522; Cochrane v. Parker, 12 Colo. App. 169, 54 Pac. 1027.

[54] McMaster v. Arthur, 33 S. C. 513, 12 S. E. 308; Ingram v. Phillips, 10 Tex. Civ. App. 17, 29 S. W. 915; Dobberstein v. Murphy, 44 Minn. 526, 47 N. W. 171; Dickey v. Gibson, 121 Cal. 276, 53 Pac. 704.

[55] In re Premier Cycle Mfg. Co., 70 Conn. 473, 39 Atl. 800; Houston v. Musgrove, 35 Tex. 594; supra, vol. 1, § 242.

in law or fact, is binding and conclusive upon the parties until its effect is destroyed in some regular proceeding for that purpose.[56] It is also to be remarked that a judgment rendered upon constructive service of process, when the statute has been fully complied with, is as conclusive as if there had been personal service on the defendant.[57] And a doubt expressed by the court as to its right to entertain jurisdiction of the particular suit will not lessen the effect of its judgment, as res judicata, if in fact it does exercise jurisdiction and determine the controversy.[58]

§ 514. Erroneous Judgments.

It is not essential to the operation of a judgment or decree as an estoppel that it should be legally right; it is enough if a court having jurisdiction has decided the point in issue.[59] "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, as a general rule, is regarded as binding in every other court."[60] Hence when a judgment of a court of general jurisdiction is offered as evidence in a collateral suit, and is pertinent to the issue in such collateral suit, the judgment, however erroneous, is admissible, and is conclusive upon the point to which it speaks, unless

[56] Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; Elliott v. Piersol, 1 Pet. 340, 7 L. Ed. 164; Gunn v. Plant, 94 U. S. 664, 24 L. Ed. 304; Gorrill v. Whittier, 3 N. H. 269; Claggett v. Simes, 31 N. H. 56; Minor v. Walter, 17 Mass. 237; Smith v. Shaw, 12 Johns. (N. Y.) 257; Wilkinson v. Vorce, 41 Barb. (N. Y.) 370; Camberford v. Hall, 3 McCord (S. C.) 345; Lancaster v. Wilson, 27 Grat. (Va.) 624; White v. Albertson, 14 N. C. 241, 22 Am. Dec. 719; Vickery v. Scott, 20 Ga. 798; Kenan v. Miller, 2 Kelly (Ga.) 325; Rodgers v. Evans, 8 Ga. 143, 52 Am. Dec. 390; Peterman v. Watkins, 19 Ga. 153; Crutchfield v. State, 24 Ga. 335; Ponder v. Moseley, 2 Fla. 207, 48 Am. Dec. 194; Wyman v. Campbell, 6 Port. (Ala.) 219, 31 Am. Dec. 677; Cole v. Conolly, 16 Ala. 271; Moore v. Ware, 51 Miss. 206; Willis v. Ferguson, 46 Tex. 496; Sutherland v. De Leon, 1 Tex. 250, 46 Am. Dec. 100; Kern v. Strausberger, 71 Ill. 303; Reed v. Wright, 2 G. Greene (Iowa) 15; Delaney v. Reade, 4 Iowa, 292; Hart v. Jewett, 11 Iowa, 276; Haygood v. McKoon, 49 Mo. 79; Rogan v. Walker, 1 Wis. 597; supra, vol. 1, § 261.

[57] McCotter v. Flynn, 61 N. Y. Supp. 786, 30 Misc. Rep. 119.

[58] Williams v. Tomlin (Va.) 28 S. E. 883.

[59] State v. Ramsburg, 43 Md. 325.

[60] Nations v. Johnson, 24 How. 195, 16 L. Ed. 628.

it is made affirmatively to appear that the court which rendered it had no jurisdiction of parties or subject-matter.[61]

§ 515. In Actions to Annul Judgments.

In an action of nullity, the judgment attacked as null cannot of course be pleaded as res judicata; but this principle does not apply where the grounds of nullity asserted had been considered and validly determined by that judgment itself.[62] Nor can the plea of res judicata be opposed to an action of which the very object is the interpretation and regulation of the judgment pleaded in bar.[63]

PART III. ORGANIZATION AND CHARACTER OF THE COURT.

§ 516. Judgment must be rendered by a Validly Constituted Court.

The validity of a judgment as a bar or estoppel depends primarily upon the organization and character of the tribunal from which it professes to emanate. And it is first of all requisite that the judgment should have been rendered by a legally constituted court,—one known to and recognized by the law.[64] In the case cited a document was offered in evidence, purporting to be a judgment, which appeared on its face to have been put forth by certain persons who were members of the English court of Exchequer, joined with others who were not; and it was said that it was evidently a proceeding before persons not forming any court known to the laws of the land as having authority to decide the matter in issue or make the decree in question; and it was therefore adjudged inadmissible. In the language

[61] Manley v. Mickle, 53 N. J. Eq. 155, 32 Atl. 210; Preiss v. Cohen, 117 N. C. 54, 23 S. E. 162; Police Jury of Lafourche v. Police Jury of Terrebonne, 49 La. Ann. 1331, 22 South. 376; Watson v. Hopkins, 27 Tex. 637; Kelley v. Mize, 3 Sneed (Tenn.) 59; Phillips v. Lewis, 109 Ind. 62, 9 N. E. 395; Fiscus v. Guthrie, 125 Ind. 598, 25 N. E. 285; Eckert v. Binckley, 134 Ind. 614, 33 N. E. 619; McCrillis v. Harrison Co., 63 Iowa, 592, 19 N. W. 679; Bank of Santa Fe v. Haskell County Bank, 51 Kan. 50, 32 Pac. 627; Carr v. Brick, 113 Mich. 664, 71 N. W. 1103; Wolverton v. Baker, 86 Cal. 591, 25 Pac. 54; Keech v. Beatty, 127 Cal. 177, 59 Pac. 837.

[62] Hoggatt's Heirs v. Crandall, 39 La. Ann. 976, 3 South. 89.

[63] Davidson v. City of New Orleans, 32 La. Ann. 1245.

[64] Rogers v. Wood, 2 B. & Adol. 245.

of Chief Justice Marshall: "A sentence, professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever."[65] Yet, in the case of domestic tribunals, if the body pronouncing the sentence has the character of a de facto court, its adjudications, made in the course of regular proceedings, are generally held valid and binding upon the parties, although afterwards it is declared to be an unconstitutional and unlawful body.[66] We have already considered this point at some length, as also the proper effect to be given to judgments rendered in the courts of the southern states during the late war.[67] It must also be remarked, in this connection, that the courts will in proper cases give effect to decisions made by the ruling bodies of voluntary societies, clubs, or eleemosynary institutions, or by the tribunals appointed within them for the settlement of their own disputes,—not, indeed, on the ground that such bodies are courts known to the law, but because the party has voluntarily bound himself to abide by their decision upon matters within their jurisdiction. Thus, in a case in Iowa, a decision by the "grand lodge" of a certain society, finding that the plaintiff was lawfully expelled from his lodge on account of fraud and deceit practised by him in respect to certain benefits and relief which he claimed to be entitled to, and that consequently his claim for such benefits must be dismissed, was held to be a good defense to an action at law by him to recover the same claims.[68] Returning to the judgments of the regular courts, it is further to be observed that while the judgments of courts of concurrent jurisdiction are evidence only where the very same matter comes distinctly in issue between the same

[65] Rose v. Himely, 4 Cranch, 241, 2 L. Ed. 608.

[66] State v. Carroll, 38 Conn. 449, 9 Am. Rep. 409; State v. Anone, 2 Nott & McC. (S. C.) 27; Gilliam v. Reddick, 26 N. C. 368; State v. Alling, 12 Ohio, 16; Masterson v. Matthews, 60 Ala. 260; State v. Porter, 1 Ala. 688; Mayo v. Stoneum, 2 Ala. 390.

[67] See supra, vol. 1, § 173.

[68] Woolsey v. Independent Order of Odd Fellows, 61 Iowa, 492, 16 N. W. 576. See, also, State v. Chamber of Commerce, 47 Wis. 670, 3 N. W. 760; Sale v. First Baptist Church, 1 Am. & Eng. Corp. Cas. 169. As to college orders, see Rex v. Grundon, 1 Cowp. 315.

parties, the judgments of courts of exclusive jurisdiction are evidence whether the matter arises incidentally or is the matter directly at issue.[69]

§ 517. Courts of Equity.

A decree in chancery, like a judgment at law, when rendered on the merits, is final and conclusive upon the parties, not only as to facts or issues actually decided, but as to all points necessarily involved in the matter adjudicated.[70] "We hold no doctrine to be better settled than this, that whenever the parties to a suit and the subject in controversy between them are within the regular jurisdiction of a court of equity, the decree of that court, solemnly and finally pronounced, is to every intent as binding as would be the judgment of a court of law upon parties and their interests regularly within its cognizance." [71]

§ 518. Decrees in Equity binding at Law, and Vice Versa.

In the application of the principle of res judicata, there is no difference between courts of law and courts of equity; when an issue of fact or of law has been adjudicated upon the merits in either tribunal, it cannot be again litigated in the other.[72] Thus, subject to certain limitations to be hereafter noticed, a judgment at law on the merits will bar any further action between the same parties on the same subject-matter in a court of chancery; the principle being that equity will not overhaul a judgment at law, nor allow its merits to be canvassed a second time, unless some of those circumstances are

[69] Duchess of Kingston's Case, 20 How. St. Tr. 355; Mackintosh v. Smith, 4 Macq. H. L. Cas. 913, 924. Where a court is composed of several branches or divisions, or presided over by several judges, a ruling or decision in either division, or by either judge, is binding on the other. City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; Marvin v. Welder, 31 Neb. 774, 48 N. W. 825.

[70] McDonald v. Mobile Life Ins. Co., 65 Ala. 358; Evans v. Tatem, 9 Serg. & R. (Pa.) 261, 11 Am. Dec. 717; Bank of United States v. Beverley, 1 How. 148, 11 L. Ed. 75; Poole v. Seney, 70 Iowa, 275, 24 N. W. 520; Low v. Mussey, 41 Vt. 393; Meyer v. Meyer, 40 Ill. App. 94.

[71] Pennington v. Gibson, 16 How. 65, 14 L. Ed. 847.

[72] Strang v. Moog, 72 Ala. 460; Western Min. & Manuf'g Co. v. Virginia Cannel Coal Co., 10 W. Va. 250.

shown upon which the jurisdiction of equity is peculiarly based.[73] And this rule, here applied to cases involving a determination of the whole cause of action, holds equally good with respect to a particular point or question decided by the judgment at law and coming in issue in the subsequent suit in chancery. For example, where the complainant, being a corporation, without fraud or collusion recovers a judgment against its debtor on a contract, the judgment determines the validity of the contract, and the question cannot be re-opened when the creditor goes into equity to reach and condemn equitable assets.[74] So on a petition to restrain execution under a judgment, equity will not hear the same grounds of defense which were set up and decided at law; they are res judicata.[75] The exceptions are, where the defense, though available at law, was not there presented, for reasons which sufficiently excuse the omission; where newly-discovered evidence supplements or changes it; where there was fraud in procuring the judgment; and where the defense is of a purely equitable character.[76] Where a court of equity and a court of law have concurrent jurisdiction of the subject-matter of a suit, if the plaintiff elects to proceed at law in the first place, the decision of the question in that court will be conclusive upon the rights of the parties in a subsequent suit in equity, to the same extent that it would

[73] Mayor v. Lord, 9 Wall. 409, 19 L. Ed. 704; Tilton v. Cofield, 93 U. S. 163, 23 L. Ed. 858; Tompkins v. Drennen, 6 C. C. A. 83, 56 Fed. 694; Alley v. Chase, 83 Me. 537, 22 Atl. 393; Cowan v. Wheeler, 25 Me. 267, 43 Am. Dec. 283; Lane v. Lane, 80 Me. 570, 16 Atl. 323; Hollister v. Barkley, 11 N. H. 501; Shottenkirk v. Wheeler, 3 Johns. Ch. (N. Y.) 275; Donovan v. Finn, 1 Hopk. Ch. (N. Y.) 59, 14 Am. Dec. 531; Hendrickson v. Norcross' Ex'rs, 19 N. J. Eq. 417; West New York Silk-Mill Co. v. Laubsch, 53 N. J. Eq. 65, 30 Atl. 814; Peet v. Hatcher, 112 Ala. 514, 21 South. 711, 57 Am. St. Rep. 45; Brinkerhoff v. Telford, 58 Ill. App. 56; Pratt v. Weyman, 1 McCord, Eq. (S. C.) 156; Tilson v. Davis, 32 Grat. (Va.) 92; Pollock v. Gilbert, 16 Ga. 398, 60 Am. Dec. 732; McCampbell v. McCampbell, 5 Litt. (Ky.) 92, 15 Am. Dec. 48; Triplett v. Gill, 7 J. J. Marsh. (Ky.) 432; Hunt v. Terril's Heirs, 7 J. J. Marsh. (Ky.) 67; Rogers v. Waller, 4 Hayw. (Tenn.) 205, 9 Am. Dec. 758; Robbins v. Collier, 3 N. M. (Gild.) 342, 5 Pac. 538; Baldwin v. McCrea, 38 Ga. 650.

[74] Alabama Warehouse Co. v. Jones, 62 Ala. 550.

[75] Rachal v. Smith, 42 C. C. A. 297, 101 Fed. 159; Codde v. Mahiat, 109 Mich. 186, 66 N. W. 1093.

[76] For a full discussion of this point, see supra, vol. 1, §§ 365–392.

have been in a new suit at law in relation to the same matter.[77] "To give a court of equity jurisdiction on the same unvaried matter, properly determined at law, would make a court of equity a court of errors and appeals."[78] But where the subject-matter is one of which equity has exclusive cognizance, the case is different. "When a cause involves matter exclusively within the jurisdiction of equity, its final decision at law will not preclude a re-examination in chancery. Under such circumstances the doctrine of res judicata does not apply. For as the matter on which the intervention of equity is asked could not have been determined at law, it cannot be within the estoppel of the legal decision."[79]

And conversely, when a cause has been heard on the merits in chancery, this will preclude the parties from any further controversy concerning the same questions in a court of law.[80] But there may be an adjudication of a cause in equity which, while it is final for the purposes of that forum, does not involve such a determination of the real matters in litigation—the merits of the controversy—that it ought in justice to prevent the parties from carrying their dispute to a court of law.[81] Thus, for example, where the maker of a promissory note brings an action in equity to enjoin the negotiation of the

[77] Orcutt v. Orms, 3 Paige (N. Y.) 459; Southgate v. Montgomery, 1 Paige (N. Y.) 41.

[78] Overton v. Searcy, Cooke (Tenn.) 36, 5 Am. Dec. 665.

[79] Pollock v. Gilbert, 16 Ga. 398, 60 Am. Dec. 732; Bryant v. Hunter, 3 Wash. C. C. 48, Fed. Cas. No. 2,068; City of Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611; Hawkins v. Depriest, 4 Munf. (Va.) 469.

[80] Washington Bridge Co. v. Stewart, 8 How. 413, 11 L. Ed. 658; Parker v. Kane, 22 How. 1, 16 L. Ed. 286; Stewart v. Village of Ashtabula (C. C.) 98 Fed. 516; Fidelity Insurance, T. & S. D. Co. v. Fridenberg, 175 Pa. 500, 34 Atl. 848, 52 Am. St. Rep. 851; Young v. Farwell. 165 N. Y. 341, 59 N. E. 143; H. B. Claflin Co. v. De Vaughn, 106 Ga. 282, 32 S. E. 108; Terre Haute & I. R. Co. v. Peoria & P. U. Ry. Co., 81 Ill. App. 435; Wolverton v. Baker, 86 Cal. 591, 25 Pac. 54; Bruce v. Foley. 18 Wash. 96, 50 Pac. 935; Hall v. Dodge, 38 N. H. 346; Pierson v. Catlin. 18 Vt. 77; Bigelow v. Winsor, 1 Gray (Mass.) 299; Powers v. Chelsea Sav. Bank, 129 Mass. 44; Williams v. Row, 62 Pa. 118; Westcott v. Edmunds, 68 Pa. 34; Baldwin v. McCrea, 38 Ga. 650; Putnam v. Clark, 34 N. J. Eq. 532; Pleasants v. Clements. 2 Leigh (Va.) 474; Morgan's Heirs v. Patton, 4 T. B. Mon. (Ky.) 453.

[81] Where a suit in equity is dismissed on the ground that it appears from the facts found that the complainant has an adequate remedy at law, the facts found and the court's conclusions of law thereon are not determinations

note and to obtain its surrender and cancellation, on the ground of fraud and want of consideration, and his petition is dismissed on the merits, he is not thereby estopped from setting up the same matter as a defense to a subsequent action at law against him on the note. Because such prior adjudication amounts to no more than a refusal of equity to interfere with his remedies at law. The court which decided this point expressed itself as follows: "The only effect, in our opinion, of the dismissal of the petition, was to declare that the plaintiff had no equitable right to maintain the action, and that the rights of the parties remained the same as if no action had been brought or injunction allowed, save only that the dismissal was a bar to the bringing of another action [i. e., in equity] for the same matter." [82]

§ 519. Probate Adjudications.

The effect to be given to the decrees and orders of the probate courts, as matters of evidence, is governed by special and peculiar rules. On this account, and because the subject is one of some magnitude, the full discussion of it is reserved for a later sub-division of this chapter, being mentioned here only for the sake of logical connection, and being for the present dismissed with the remark that such adjudications, upon matters within the special cognizance of those courts, are generally held binding at law, though not always in equity.[83]

§ 520. Judgments of the Federal Courts.

The judgment or decree of one of the federal courts constitutes a complete bar to the prosecution of a subsequent suit upon the same cause of action in a state court, or a complete estoppel in respect to the points actually determined by it; and conversely, a point which has been once litigated and determined in a state court cannot be again drawn in question between the parties in a federal court.[84] The courts of the United States, though possessing a special and lim-

estopping defendant from asserting otherwise in a subsequent action at law. Barnett v. Smart, 158 Mo. 167, 59 S. W. 235.

[82] Cramer v. Moore, 36 Ohio St. 347; Porter v. Wagner, Id. 471.

[83] See infra, §§ 633-646.

[84] Infra, §§ 938, 939.

ited jurisdiction, are not to be regarded as courts of inferior jurisdiction in such sense that their proceedings must show jurisdiction on their face in order to be respected and to be protected from collateral impeachment.[85]

§ 521. Courts of Admiralty.

Where a matter has been directly litigated in a common law court, that judgment may be set up as an estoppel in a court of admiralty.[86] And conversely, the sentence of an admiralty court, within its jurisdiction, is conclusive upon the matters decided when the same issues are brought in question in a court of law.[87] As the decrees made in admiralty are for the most part in rem, it is chiefly in that character that we are called upon to consider their binding effect, and the reader will find the subject discussed in a later chapter of this book. As a general rule, a judgment in rem is everywhere conclusive as to all the grounds upon which it proceeds. But it has been held that a decree in a suit in rem in admiralty, brought by a master to recover his wages, holding that he had deserted his vessel and had therefore forfeited his entire wages, is no bar to a common law action to recover for the same services.[88]

[85] Supra, vol. 1, § 285. Nil debet is not a good plea to an action brought in one federal court upon a judgment rendered by another federal court. Reed v. Ross, Baldw. 36, Fed. Cas. No. 11,652. Where a federal court has exercised jurisdiction on the ground of diverse citizenship, the proceedings cannot be attacked in another action between different parties, on the ground that the citizenship was not diverse. Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. 659, 36 L. Ed. 368.

[86] Goodrich v. City of Chicago, 5 Wall. 566, 18 L. Ed. 511. But see Carmody v. City of Rome (D. C.) 49 Fed. 392.

[87] Cupisino v. Perez, 2 Dall. 194, 1 L. Ed. 345; The Rio Grande v. Otis, 23 Wall. 458, 23 L. Ed. 158; Wager v. Providence Ins. Co., 150 U. S. 99, 14 Sup. Ct. 55, 37 L. Ed. 1013.

[88] People v. Judge of Wayne Circuit, 27 Mich. 406, 15 Am. Rep. 195; Murphy v. Granger, 32 Mich. 358. In the earlier of these two cases, Judge Campbell said: "No case has been cited, and we have not been able to find any, wherein it has been held that a common law court has any right to prevent a party from enforcing a common law remedy, on account of the pending of any but common law proceedings. It being his absolute right to sue at common law if he chooses, the common law will protect him in it. And inasmuch as proceedings to enforce a security are in their nature collateral

§ 522. Inferior Courts.

The judgment of a justice of the peace or other inferior tribunal (in a case where jurisdiction of the parties and subject-matter appears from the face of the proceedings), so long as it remains unreversed, is, for every purpose, as binding and conclusive between the parties as that of the highest court of record in the state.[89] Thus, in a suit brought on a judgment recovered in an inferior court, if the record shows jurisdiction of the subject-matter, the judgment will be conclusive against the parties, and no matter of defense which existed anterior to the recovery of the judgment can be pleaded or given in evidence on the trial.[90] In a case in New Jersey, where justices of the peace and surveyors of highways made a determination in writing, relating to encroachments on a road by adjoining landowners, which determination was partially acted upon, and boundary-lines fixed, and afterwards an entirely different determination, as to

to proceedings to establish a personal liability, there is always a possibility at least that, whether the personal claim be made out or not, the remedy against the security may not be established, or, if established, may not be adequate. And while a double satisfaction can never be obtained in any court, concurrent and cumulative remedies are by no means unknown and are not universally forbidden. Questions have frequently arisen on this subject, and the decisions do not sustain the right of courts to interfere with the lawful action of the parties suing. Admiralty and common law remedies have not been regarded as so far alike in their rules and effect as to stand on the same footing. . . . . Neither, until satisfied, will even a judgment in rem or in personam prevent further proceedings on the same claim." In this case, it will be perceived, the pendency of the admiralty proceedings was held no bar to the suit at law. In the later of the cases cited, it was decided that the plaintiff was not estopped by the adverse judgment in the admiralty case.

[89] Flitters v. Allfrey, L. R. 10 C. P. 29; Spaulding v. Chamberlin, 12 Vt. 538, 36 Am. Dec. 358; Pease v. Howard, 14 Johns. (N. Y.) 479; Mitchell v. Hawley, 4 Denio (N. Y.) 414, 47 Am. Dec. 260; Andrews v. Montgomery, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213; Boyer v. Schofield, *41 N. Y. 631; Hallock v. Dominy, 69 N. Y. 238; Emery v. Nelson, 9 Serg. & R. (Pa.) 12; Hazelett v. Ford, 10 Watts (Pa.) 101; Cumberland Coal & Iron Co. v. Jeffries, 27 Md. 526; Burke v. Elliott, 26 N. C. 355, 42 Am. Dec. 142; Ludwick v. Fair, 29 N. C. 422, 47 Am. Dec. 333; Shaver v. Shell, 24 Ark. 122; Bernal v. Lynch, 36 Cal. 135; Thompson v. Multnomah Co., 2 Or. 34. See, supra, vol. 1, § 250. Compare Leonard v. Sparks, 63 Mo. App. 585; Pettus v. Atlantic Sav. & Loan Ass'n, 94 Va. 477, 26 S. E. 834.

[90] Van Doren v. Horton, 25 N. J. Law, 205.

the place and encroachments on the same road, was made by the same officers, without the first determination being set aside or reversed, it was held that the action of this body was a judicial one, and the first determination was a bar to the second and rendered it invalid.[91]

§ 523. Ecclesiastical Courts.

In England, the sentence of an ecclesiastical court ex directo, in a matter properly cognizable there, is conclusive evidence when the same matter comes in question directly or collaterally in a court of law or equity.[92] In this country, the tribunals established by religious societies for the adjudication of questions of faith and discipline are not recognized as courts of the land. But the decisions of such ecclesiastical judicatories as to their own jurisdiction in ecclesiastical matters, where there is not a clear absence of jurisdiction, will receive great weight in the civil courts. Where such tribunals have jurisdiction, civil courts will not inquire whether they have proceeded according to the laws and usages of their church, or whether they have decided correctly; but their decisions are final and binding upon the parties and courts.[93] But when property rights are concerned, the ecclesiastical courts have no power whatever to pass upon them so as to bind the civil courts. If a member of the church feels himself aggrieved in his rights of property by the action of an ecclesiastical tribunal, he may resort to the civil courts, and they will not consider themselves precluded by the judgment of that tribunal.[94]

§ 524. Courts-Martial.

Courts-martial are lawful tribunals, existing by the same authority as the civil courts of the United States, have the same plenary jurisdiction in offenses by the law military as the latter courts have in

[91] Amerman v. Briggs, 50 N. J. Law, 114, 11 Atl. 423. See Stone v. City of Augusta, 46 Me. 127; Galbraith v. Black, 4 Serg. & R. (Pa.) 207.

[92] Meadows v. Duchess of Kingston, Amb. 756; Kenn's Case, 7 Coke, 43b.

[93] Connitt v. Reformed Protestant Dutch Church, 54 N. Y. 551. See Baptist Church v. Witherell, 3 Paige (N. Y.) 296, 24 Am. Dec. 223; Gable v. Miller, 10 Paige (N. Y.) 627; Shannon v. Frost, 3 B. Mon. (Ky.) 258; German Reformed Church v. Commonwealth, 3 Pa. 291.

[94] Watson v. Garvin, 54 Mo. 353.

controversies within their cognizance, and in their special and more limited sphere are entitled to as untrammeled an exercise of their powers. Provided a court-martial has jurisdiction to hear and determine and to render the particular judgment or sentence imposed, however erroneous the proceedings may be, they cannot be reviewed collaterally in any other court in any kind of proceeding.[95] The sentence of such a court, when confirmed, "is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had no jurisdiction over the subject-matter or charge, or one in which, having jurisdiction over the subject-matter, it has failed to observe the rules prescribed by the statute for its exercise. In such cases, all of the parties to such illegal trial are trespassers upon a party aggrieved by it, and he may recover damages from them on a proper suit in a civil court by the verdict of a jury."[96] The binding effect of such sentences also extends to the question of the composition of the court. Thus, the officer who orders a court-martial being necessarily obliged to decide whether thirteen officers can be convened without injury to the service, and also whether the appointment thereon of officers of inferior rank can be avoided, his decision on both points is conclusive.[97]

It is true that the civil courts may, in any case, by means of the writ of habeas corpus, inquire into the jurisdiction of a court martial, and if the person condemned was not amenable to its jurisdiction, may discharge him from the sentence; but the civil courts cannot, by means of this writ, exercise any supervisory or correcting power over the proceedings of a court martial, and no mere errors in its proceedings are open to consideration.[98]

[95] Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838; Ex parte Reed, 100 U. S. 13, 25 L. Ed. 538; Swaim v. United States, 165 U. S. 553, 17 Sup. Ct. 448, 41 L. Ed. 823; In re White (C. C.) 17 Fed. 723; In re Davison (C. C.) 21 Fed. 618; In re McVey (D. C.) 23 Fed. 878; In re Zimmerman (C. C.) 30 Fed. 176; Vanderheyden v. Young, 11 Johns. (N. Y.) 150; Mills v. Martin, 19 Johns. (N. Y.) 7; Duffield v. Smith, 3 Serg. & R. (Pa.) 590; Brown v. Wadsworth, 15 Vt. 170, 40 Am. Dec. 674; Chesterfield v. Perkins, 58 N. H. 573.

[96] Dynes v. Hoover, 20 How. 65, 15 L. Ed. 838.

[97] Wooley v. United States, 20 Law Rep. 631.

[98] United States v. Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636; Wales v. Whitney, 114 U. S. 564, 5 Sup. Ct. 1050, 29 L. Ed. 277; Johnson v.

§ 525. Military Tribunals.

It has also been held that the judgment of a military tribunal erected by the commander of the forces in occupation of a district of conquered territory, for the general administration of justice therein, is binding and conclusive upon the parties in all other courts.[99] This

Sayre, 158 U. S. 109, 15 Sup. Ct. 773, 39 L. Ed. 914; Barrett v. Hopkins (C. C.) 7 Fed. 312; In re Esmond, 5 Mackey (D. C.) 64.

[99] Hefferman v. Porter, 6 Cold. (Tenn.) 391, 98 Am. Dec. 459. The opinion by Ellett, J., is as follows: "This suit was brought by Hefferman against Porter in September, 1865. The defendant, among other things, pleaded in bar the judgment of a tribunal known as the civil commission, created by order of the commander of the United States forces in the District of Memphis in April, 1863, before which, it is alleged, the plaintiff impleaded the defendant concerning the same causes for which the present action is brought. . . . . The defendant seeks to give effect to the judgment of this tribunal as res judicata, while the plaintiff denies to it any validity whatever, and insists that the proceeding was coram non judice and void. No objection is stated to the organization of the court, its mode of proceeding, or the forms of trial, judgment, or execution; but it is insisted that such a court is unknown to the constitution and laws of the state, or of the United States, and that it was not within the power of the military commander to create it. . . . . The questions, as to the power of the commander of the military forces of the United States, in any district in the insurrectionary states, held in firm possession by force of arms, during such belligerent occupation, to establish such temporary government in such district, or any part thereof, as he might see proper, and to appoint and control the necessary officers and agents, and to prescribe the mode in which such government should be administered, are not open questions in this court. [Rutledge v. Fogg, 3 Cold. (Tenn.) 554, 91 Am. Dec. 299; Isbell v. Farris, 5 Cold. (Tenn.) 426.] . . . . Government of such territory, while so held in military occupation, is not less a duty than a necessity; and the right to create a government, or rather the right to govern, implies the right to determine in what manner and through what agencies such government is to be conducted. The municipal laws of the place may be left in operation, or they may be suspended, and other laws put in force. The administration of justice may be left in the hands of the ordinary officers of the law, or these may be suspended and others appointed in their place. Civil rights and civil remedies may be suspended, and military laws and military courts and proceedings may be substituted for them; or new tribunals may be established, and new legal remedies and civil proceedings may be introduced. Halleck, International Law, 380. The conqueror exercises for the time being the powers of a de facto government, and the jurisdiction and authority possessed and exercised by the tribunals created by him must depend upon his discretion. . . . . The establishment of legal tribunals for the adjudication and protection of

decision appears to us so entirely in accordance with the doctrines of international law, and so obviously right in itself, that it is rather surprising that it should have been overruled. Such, however, is the case. A later decision of the same court, abandoning the position before taken, announces the rule that while the commander of a military district in insurrectionary territory may establish a tribunal for the trial of military offenses, he cannot set up a civil commission for the trial of civil causes, and a judgment rendered by such a commission is a nullity.[100] Though the question is no longer of much practical importance, it is to be regretted that the earlier and correct view should have been thus forsaken.

§ 526. Awards of Arbitrators.

In regard to its conclusiveness upon the points adjudged, and as a bar to a future action for the same cause, an award by arbitrators, which is regular and final, has precisely the same effect as a judgment or decree of a court.[101] And the opinion has been expressed,

civil rights, is the most favorable condition for the conquered people. There is always more or less security in a judicial body, organized according to the forms of law, for the administration of justice according to the rules that obtain in courts of judicature. There is a dignity and responsibility about such a position that does not fail to command a decent regard to the ordinary rules of justice and of right, or to mitigate the rigor of military rule to some degree of harmony with the humane theories of modern warfare. If, then, the power to create such civil courts exists, by the laws of war, in a place held in firm possession by a belligerent military occupation, and if their judgments and decrees are held to be binding on all parties during the period of such occupation, as the acts of a de facto government, we are not able to see on what grounds we can refuse to them a like effect when pleaded as res judicata before the regular judicial tribunals of the state, since the return of peace."

[100] Walt v. Thomasson, 10 Heisk. (Tenn.) 151. Reliance is mainly placed on the ruling of the Judge Advocate General (Holt) in two cases before the said commission, apparently not reported.

[101] Greene v. Darling, 5 Mason, 201, Fed. Cas. No. 5,765; Roth v. Colvin, 32 Vt. 125; Bulkley v. Stewart, 1 Day, 130, 2 Am. Dec. 57; Holmes v. Aery, 12 Mass. 134; Boston Water Power Co. v. Gray, 6 Metc. (Mass.) 131; Armstrong v. Masten, 11 Johns. (N. Y.) 189; Brazill v. Isham, 2 Kern. (N. Y.) 9; Prentiss v. Farnham, 22 Barb. (N. Y.) 519; Sinclair v. Tallmadge, 35 Barb. (N. Y.) 602; Hostetter v. City of Pittsburgh, 107 Pa. 419; Lloyd v. Barr, 11 Pa. 41; Richardson v. Lanning, 26 N. J. Law, 130; Corbin v. Adams, 76 Va. 58; Ballard

in New York and some other states, that after a submission of all demands of the parties against each other, and an award thereon, the award is a conclusive bar to an action for any demand subsisting at the time of the submission and award, though the demand for which the action is brought was by mistake omitted to be laid before the arbitrators, or intentionally withheld, and was not considered or decided on by them.[102] But the preponderance of authority is opposed to this view. It is generally held that an award will not operate as a bar to a future action for a demand which was not actually submitted to the arbitrators nor adjudicated by them, notwithstanding it was in existence when the submission was made, and although the agreement was to submit all demands.[103] If arbitrators, to whom an action on a mortgage is submitted, estimate, in making their award, other claims of the plaintiff against the defendant, without the plaintiff's express assent thereto, and their award does not in amount exceed the plaintiff's claim on the mortgage, he will not thereby be barred in an action to recover those other claims from the defendant.[104] In general a mere agreement to submit a demand to arbitration, without action taken upon it, is no bar to a suit upon the demand at law.[105] But in Pennsylvania it is held that where a contract for the construction of works contains a stipulation that all questions of dispute arising thereunder shall be submitted to a designated person as arbitrator for a final decision, such stipulation is a bar to an action

v. Mitchell, 53 N. C. 153; Whitlock v. Crew, 28 Ga. 289; Anders v. Anders, 31 N. C. 214; Penisten v. Somers, 15 La. Ann. 679; Groat v. Pracht, 31 Kan. 656, 3 Pac. 274; Rogers v. Holden, 13 Ill. 293; Ross v. Watt, 16 Ill. 99; Jarvis v. Fountain Water Co., 5 Cal. 179; Johnston v. Paul, 23 Minn. 46; Kane v. City of Fond du Lac, 40 Wis. 495.

[102] Wheeler v. Van Houten, 12 Johns. (N. Y.) 311; Bunnel v. Pinto, 2 Conn. 431; Owen v. Boerum, 23 Barb. (N. Y.) 187; McJimsey v. Traverse, 1 Stew. (Ala.) 244, 18 Am. Dec. 43; Robinson v. Morse, 26 Vt. 392; Lowenstein v. McIntosh, 37 Barb. (N. Y.) 251.

[103] Webster v. Lee, 5 Mass. 334; Newnan v. Wood, Mart. & Y. (Tenn.) 190; Whittemore v. Whittemore, 2 N. H. 26; Buck v. Buck, 2 Vt. 417; Hewitt v. Furman, 16 Serg. & R. (Pa.) 135; Bixby v. Whitney, 5 Me. 192; Edwards v. Stevens, 1 Allen (Mass.) 315; Hodges v. Hodges, 9 Mass. 320; King v. Savory, 8 Cush. (Mass.) 309; Elliott v. Quimby, 13 N. H. 181.

[104] Connelly v. Arnold, 6 Watts (Pa.) 312.

[105] Haggart v. Morgan, 5 N. Y. 422, 55 Am. Dec. 350.

at common law for any such matter in dispute.[106] In some of the states the rule is, that the award itself holds exactly the position of a verdict of a jury; that is, it is not definitely conclusive upon the parties until the judgment of the court has been entered upon it.[107] An award of arbitrators finding "no cause of action" is a finding for the defendant, and a judgment upon it is conclusive of the plaintiff's right.[108] An award is also said to be evidence of every fact the decision of which is clearly implied in such award, although not expressly stated to have been decided.[109] In regard to questions of law, the rule is that if they are distinctly submitted, the decision of the arbitrators will be final unless it appears upon the award that the arbitrators, intending to decide according to the law, have plainly mistaken what it is, and have acted on an erroneous rule of law.[110] The well-known principle, that arbitrators are not bound to proceed according to the ordinary rules of evidence, sometimes produces the curious result that, while an award is conclusive in a court of law, a judgment of a court may not be conclusive in an arbitration. It is said that if parties submit to referees all demands between them, a judgment recovered by one of them against the other, and by him laid before the referees, will not be conclusive upon them, but they may, should they see fit, re-examine it upon its merits. "They were not bound," said the supreme court of New Hampshire in deciding this point, "by the legal qualities which might have belonged to it in a court of law. If they considered the judgment inequitable, they were at liberty to disregard it in whole or in part, and to decide according to what they considered the equity of the case. They might admit evidence to show it was improperly rendered on the merits, as they might admit other evidence which would be inadmissible in a court of law." [111] On principles similar to those which govern the law of awards, it is held that when parties have agreed to refer a case to

[106] Hostetter v. City of Pittsburgh, 107 Pa. 419.

[107] Todd v. Old Colony & F. R. Co., 3 Allen (Mass.) 18, 80 Am. Dec. 49; Taylor v. Sindall, 34 Md. 38; Shelbina Hotel Association v. Parker, 58 Mo. 327.

[108] Green v. Fricker, 7 Watts & S. (Pa.) 171.

[109] Shackelford v. Purket, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422.

[110] Crabtree v. Green, 8 Ga. 8.

[111] Baker v. Merrifield, 13 N. H. 357.

the "commission of appeals" of a state and to abide by its award, the judgment of that court is binding and conclusive upon the supreme court as to all questions so settled in that case.[112]

§ 527. Decisions of Appellate Courts.

The doctrine of res judicata applies as well to judgments of courts of last resort as to those of nisi prius courts. If the same subject-matter comes in question in a second action before an appellate court, it is bound by its own former decision.[113] And where an appeal is taken to the court of last resort, and the action of the court below is affirmed for want of assignment of errors, the matter is res judicata and the parties are concluded, notwithstanding the fact that the appellate court had no opportunity to pass upon the merits of the question raised by the appeal.[114]

§ 528. Judgment given by Divided Court.

It has sometimes been contended in argument that a judgment pronounced by a divided court was, for that reason, not conclusive. But the authorities distinctly declare that such a judgment is just as conclusive and binding upon the parties, in every respect, as if rendered upon the concurrence of all the judges upon every question involved in the case.[115]

[112] Stelle v. Shannon, 62 Tex. 198.

[113] Chouteau v. Gibson, 76 Mo. 38; Lucas v. City of San Francisco, 28 Cal. 591; Sturgis v. Rogers, 26 Ind. 1. See Baker v. Hess, 53 Ill. App. 473. But it is only where the parties and the subject-matter are the same that an appellate court is absolutely and technically bound by its own former decision. For instance, a decision of such a court holding a statute to be constitutional, when attacked in one action, does not prevent the court from declaring it to be unconstitutional, when assailed in another action, between different parties, on other grounds. City Council of Anderson v. Fowler, 48 S. C. 8, 25 S. E. 900. If, in such a case, the court should decide to abide by its former decision, without re-examination of the validity of the statute, it would be an application of the rule of "stare decisis," not that of "res judicata."

[114] Miller v. Bernecker, 46 Mo. 194.

[115] Durant v. Essex Co., 7 Wall. 107, 19 L. Ed. 154.

§ 529. Criminal Sentences not Evidence in Civil Issues.

Since the parties to a criminal prosecution and those in a civil suit are necessarily different, and as the objects and results of the two proceedings and the rules of evidence which apply to them respectively are equally diverse, it follows that the judgment in the former cannot be used by way of estoppel in the latter, save for the single purpose of proving its own existence, if that becomes a relevant fact.[116] To illustrate,—in a suit by a widow for the homicide of her husband, the record of the acquittal of the defendant, under an indictment for the murder of the husband, is not evidence for the defendant in the civil suit, and a plea of such acquittal is demurrable.[117] And generally, where the facts set up as a ground for plaintiff's recovery in an action for damages are such as would also constitute a criminal offense, the defendant cannot prevent a recovery by showing the record of his trial and acquittal under an indictment charging the same facts as a crime.[118] Again, on the trial of an action on a policy of insurance on the life of the insured, made on condition that it should be void if he should die in the known violation of any law, the record of the trial and acquittal by a court of competent jurisdiction of the person who killed the insured, is not competent evidence to

[116] Jones v. White, 1 Strange, 68; Petrie v. Nuttall, 11 Exch. 569; Chamberlain v. Pierson, 31 C. C. A. 157, 87 Fed. 420; Mead v. City of Boston, 3 Cush. (Mass.) 404; Cluff v. Mutual Ben. Life Ins. Co., 99 Mass. 317; Betts v. Town of New Hartford, 25 Conn. 180; Hutchinson v. Merchants' & Mechanics' Bank, 41 Pa. 42, 80 Am. Dec. 596; Johnson v. Girdwood, 7 Misc. Rep. 651, 28 N. Y. Supp. 151; People v. Board of Excise Com'rs, 64 Hun, 634, 18 N. Y. Supp. 884; Landa v. Obert, 78 Tex. 33, 14 S. W. 297; Gulf, C. & S. F. Ry. Co. v. Moody (Tex. Civ. App.) 30 S. W. 574; Chesapeake, O. & S. W. R. Co. v. Dyer Co., 87 Tenn. 712, 11 S. W. 943; Clark v. Irvin, 9 Ohio, 131; Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 98; Illinois Cent. R. Co. v. Quirk, 51 Ill. App. 607; Marceau v. Travelers' Ins. Co., 101 Cal. 338, 35 Pac. 856. Thus, a judgment of conviction for assault before a justice is not admissible, in an action for damages by the person assaulted against defendant, to show the fact of assault. Doyle v. Gore, 15 Mont. 212, 38 Pac. 939.

[117] Cottingham v. Weeks, 54 Ga. 275.

[118] United States v. Jaedicke (D. C.) 73 Fed. 100; Virgo v. Virgo, 69 Law T. 460; Summers v. Bergner & Engle Brewing Co., 143 Pa. 114, 22 Atl. 707, 24 Am. St. Rep. 518; Morch v. Raubitschek, 159 Pa. 559, 28 Atl. 369; Von Hoffman v. Kendall, 63 Hun, 628, 17 N. Y. Supp. 713.

prove that the condition was broken.[119] So again, the owner of stolen goods may maintain an action for them against a person in whose possession they are found, notwithstanding the fact that such person, on an indictment in the criminal court, was acquitted of the charge of having knowingly received them from the hands of the thief.[120] For another example, in an action for slander, which consisted in charging the plaintiff with having committed a certain crime, the defendant pleaded the truth of the words spoken, and on the trial the court permitted the plaintiff to read in evidence the record of an indictment against him for the same crime and of his trial and acquittal; but on appeal it was held that this was error.[121] In respect to the general rule thus stated and exemplified, the Roman law agrees with our own.[122] But the modern French law attaches a much higher degree of conclusiveness to criminal sentences; for it permits the litigation of a claim presented before a civil tribunal only in cases where it is not inconsistent with a previous decision emanating from the criminal jurisdiction.[123]

Apparent exceptions to the general rule are to be found in some of the cases, but on examination they will not be found to contradict the leading principle. Thus, in an action of tort for malicious prosecution, the record of the criminal proceedings had against the plaintiff and the judgment of acquittal in which those proceedings resulted, are admissible in evidence to show what became of the prosecution and the fact of the plaintiff's acquittal.[124] But this does not contravene our general rule. For, as we shall hereafter see more fully, a judgment is always evidence, in all issues, as against all persons, strangers as well as parties, to prove the fact of its own rendition; while the rule contended for only goes to the extent of saying that the criminal sentence is not evidence in the civil issue of the facts on which it is founded. Hence if it were attempted, in the case supposed, to go beyond the limits above indicated, and make the judg-

[119] Cluff v. Mutual Ben. Life Ins. Co., 99 Mass. 317.

[120] Rohm v. Borland (Pa.) 7 Atl. 171.

[121] Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 98.

[122] 1 Whart. Ev. § 777, citing L. 3 Cod. de Ord. Jud. iii. 8.

[123] Marcadé, Explication du Code Napoléon, t. 5, pp. 192–199.

[124] Caddy v. Barlow, 1 Man. & Ry. 275; Arundell v. Tregono, Yel. 116; Legatt v. Tollervey, 14 East, 301; Basebe v. Matthews, L. R. 2 C. P. 684.

ment of acquittal prove the plaintiff's innocence of the crime charged, the courts would promptly deny it any such effect. And this ruling would be sustained by the further consideration that evidence of the party's guilt or innocence is not relevant in such a case, the real question being whether the prosecutor had probable cause for believing him guilty.[125]

Again, it may happen that the parties are the same in the two actions, civil and criminal; and here, the main reason of the rule being taken away, the rule itself will not always apply. Thus it is said: "Where an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit in rem by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit in rem. It is urged as a reason for not allowing such effect to the judgment that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of the preponderance of proof, there might be a verdict for the United States in the suit in rem. Nevertheless the fact or act has been put in issue and determined against the United States, and all that is imposed by the statute as a consequence of guilt is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant. When an acquittal in a criminal prosecution on behalf of the government is pleaded or offered in evidence, by the same defendant, in an action against him by an individual, the rule does not apply, for the reason that the parties are not the same, and often for the additional reason that a certain intent must be proved to support the indictment which need not be proved to support the civil action. But

[125] Skidmore v. Bricker, 77 Ill. 164. See Wilson v. Manhattan Ry. Co., 2 Misc. Rep. 127, 20 N. Y. Supp. 852. Compare Maybee v. Avery, 18 Johns. (N. Y.) 352.

upon this record, as we have already seen, the parties and the matter in issue are the same." [126]

In the next place, a criminal sentence may be admissible in evidence as a species of admission, although, strictly, it is not proper to be received as res judicata. Thus, in a civil action for assault and battery, the defendant gave in evidence, in mitigation of damages, the record of his conviction in a criminal court on an indictment for the same assault and a receipt of the sheriff for the fine and costs of the prosecution. The judge charged that, the record of such conviction having been given in evidence by the defendant himself, it was no longer matter of doubt that an assault had been committed, and the plaintiff would be entitled to some damages. And herein, it was held, there was no error. [127] On the same principle, if the defendant in a criminal prosecution pleads "guilty," the record of such prosecution and plea may be used as evidence against him in a subsequent civil action involving the same subject-matter, as tending to prove the act or fact on which the indictment was framed. But since it is not the criminal judgment, but the plea, or rather the fact of his having so pleaded, that thus becomes evidence, it is not conclusive upon him. It is receivable as an admission or confession, but it may be controverted, and must be weighed by the jury.[128]

[126] Coffey v. United States, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684. See also Starkie, Ev. pt. 2, § 80; Cooke v. Sholl, 5 Term R. 255. But an acquittal of a person indicted under Rev. St. § 2461, for taking timber from public lands, is not a bar to a civil action against him by the United States to recover the value of such timber, as the civil case turns wholly upon the issue of ownership, and does not involve any question of criminal intent, or of forfeiture for prohibited acts. Stone v. United States, 167 U. S. 178, 17 Sup. Ct. 778, 42 L. Ed. 127. On the other hand, it is said that judgment in a criminal case by the state against an individual, that certain liquors were not kept at a certain date with intent to dispose of them unlawfully, is res judicata, as to the intent at that time, in a proceeding by the state to condemn the liquor, though one proceeding is criminal and the other civil, and though the second is in rem, it being, as to the defendant, on his coming in as claimant, a proceeding inter partes. State v. Intoxicating Liquors, 72 Vt. 253, 47 Atl. 779, 82 Am. St. Rep. 937. That even where the parties are the same, a criminal judgment is not always and necessarily admissible evidence in a civil issue, may be seen from the case of United States v. Schneider (C. C.) 35 Fed. 107.

[127] Moses v. Bradley, 3 Whart. (Pa.) 272.

[128] Green v. Bedell, 48 N. H. 546; Clark v. Irvin, 9 Ohio, 131; Bradley v.

And a plea of nolo contendere to an indictment with a protestation of the defendant's innocence will not conclude him in a civil action from disputing the facts charged in the indictment.[129]

The converse of the foregoing general rule holds equally true. That is, a judgment in a civil action is not ordinarily admissible as evidence in a subsequent criminal prosecution.[130] For example, a judgment recovered against a defaulting tax collector and his sureties, in a civil action at the suit of the county, is not competent evidence against them in a prosecution on the criminal side afterwards instituted for the default.[131] And so a former judgment in a civil action is not conclusive in a penal action between the same parties, though the same question was litigated in both actions, because the measure of proof is different in the two actions.[132] But in one case, in a prosecution for the unlawful removal of a fence from land, it was considered that a judgment in a former civil action between the defendant and the prosecuting witness, rendered before the commission of the alleged trespass, whereby the disputed boundary line between their respective lands was defined and settled, was admissible in evidence. The court here recognized the general rule that civil judgments are not admissible in criminal prosecutions, but thought that the establishment of the boundary line was one of the "legal consequences" of the judgment, to prove which, as well as the fact of its

Bradley, 11 Me. 367; Woodruff v. Woodruff, Id. 475; Reg. v. Fontaine Moreau, 11 Q. B. 1033. Where one pleaded guilty to a charge of assault and battery, and paid a nominal fine, to avoid expense and loss of time in a trial, he may show, on the subsequent trial of an action for damages, that he was not in fact guilty of the offense. Crawford v. Bergen, 91 Iowa, 675, 60 N. W. 205. So the record of conviction of a wife for manslaughter in causing the death of her husband, and her plea admitting guilt of manslaughter, is no defense to a suit by her as beneficiary of a policy of insurance on his life, and is no evidence of anything to be inferred or argued from it, but only evidence of the conviction. Schreiner v. High Court of Order of Foresters, 35 Ill. App. 576.

[129] Comm. v. Horton, 9 Pick. (Mass.) 206.

[130] State v. Bradneck, 69 Conn. 212, 37 Atl. 492, 43 L. R. A. 620; People v. Leland, 73 Hun, 162, 25 N. Y. Supp. 943; Dunagain v. State, 38 Tex. Cr. App. 614, 44 S. W. 148; People v. Kenyon, 93 Mich. 19, 52 N. W. 1033; People v. Beevers, 99 Cal. 286, 33 Pac. 844.

[131] Britton v. State, 77 Ala. 202.

[132] Riker v. Hooper, 35 Vt. 457, 82 Am. Dec. 646.

rendition, a judgment is always admissible, even against strangers.[133] But one criminal sentence is always receivable as evidence of a relevant fact in another criminal proceeding against the same person. Thus, on the trial of an indictment for an assault on a police officer, committed while the defendant was under arrest for drunkenness, the record of a conviction and sentence of the defendant for drunkenness at the time of his arrest is conclusive evidence of that fact.[134]

§ 530. Decisions of United States Land Department.

The rulings and decisions of the land department of the United States government (including in that term the secretary of the interior, the commissioner of the land office, and the registers and receivers), upon questions of fact presented for their determination, in cases within their jurisdiction in the official business of the land office, and in the absence of fraud or misrepresentation, are final and conclusive and cannot be reviewed or re-examined by the courts.[135]

[133] Dorrell v. State, 83 Ind. 357.

[134] Commonwealth v. Feldman, 131 Mass. 588.

[135] Quinby v. Conlan, 104 U. S. 420, 26 L. Ed. 800; Ballance v. Forsyth, 24 How. 183, 16 L. Ed. 733; Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Warren v. Van Brunt, 19 Wall. 646, 22 L. Ed. 219; Comegys v. Vasse, 1 Pet. 193, 7 L. Ed. 108; Wilcox v. Jackson, 13 Pet. 498, 10 L. Ed. 264; Lytle v. Arkansas, 9 How. 314, 13 L. Ed. 153; St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875; Barnard v. Ashley, 18 How. 44, 15 L. Ed. 285; Garland v. Wynn, 20 How. 6, 15 L. Ed. 801; Shepley v. Cowan, 91 U. S. 340, 23 L. Ed. 424; Moore v. Robbins, 96 U. S. 535, 24 L. Ed. 848; Rector v. Gibbon, 111 U. S. 276, 4 Sup. Ct. 605, 28 L. Ed. 427; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; Vance v. Burbank, 101 U. S. 514, 25 L. Ed. 929; Wright v. Roseberry, 121 U. S. 488, 7 Sup. Ct. 985, 30 L. Ed. 1039; Carr v. Fife, 156 U. S. 494, 15 Sup. Ct. 427, 39 L. Ed. 508; Scott v. Lockey Inv. Co. (C. C.) 60 Fed. 34; Mitchell v. Cobb, 13 Ala. 137; Boatner v. Ventress, 8 Mart. N. S. (La.) 644, 20 Am. Dec. 266; Robbins v. Bunn, 54 Ill. 48, 5 Am. Rep. 75; Porter v. Bishop, 25 Fla. 749, 6 South. 863; Bracken v. Parkinson, 1 Pin. (Wis.) 685; Lamont v. Stimson, 3 Wis. 545, 62 Am. Dec. 696; Boyce v. Danz, 29 Mich. 146; State v. Batchelder, 7 Minn. 121 (Gil. 79); Hosmer v. Wallace, 47 Cal. 461; Powers v. Leith, 53 Cal. 711; Valentine v. Sloss, 103 Cal. 215, 37 Pac. 326; Irvine v. Tarbot, 105 Cal. 237, 38 Pac. 896; Grant v. Oliver, 91 Cal. 158, 27 Pac. 596; Rush v. Valentine, 12 Neb. 513, 11 N. W. 746; Van Sant v. Butler, 19 Neb. 351, 27 N. W. 299; Sanford v. Sanford, 19 Or. 1, 13 Pac. 602; Jeffords v. Hine (Ariz.) 11 Pac. 351; Ferry v. Street, 4 Utah, 521, 11 Pac. 571; Tatro v.

But to have this conclusive force and effect, it is necessary that such decisions should be made in accordance with the regular rules of practice in the department, and they must be based on legal evidence, or upon some formal inquiry, at which the parties have a fair opportunity of presenting evidence to support the rights which they assert.[136] And it must be noted that the rulings of the land department are binding upon the courts only in so far as they determine questions of fact; their decisions upon points of law are not final in such sense as to preclude a review by the courts when properly presented for their consideration.[137] But although a decision of the land office may be plainly erroneous, as a matter of law, yet it is not for that reason void, but only voidable; and it will support rights claimed under it until duly reversed or set aside,[138] and will not be impeachable collaterally.[139] And where there was a mixed question

French, 33 Kan. 49, 5 Pac. 426; Parsons v. Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669. Among the officers whose rulings are conclusive are also to be included the surveyor general (Pin v. Morris, 1 Or. 230), and the board of commissioners of Mexican land claims. Beard v. Federy, 3 Wall. 478, 18 L. Ed. 88. Decisions of the land office are binding not only on the courts of the federal system, but also upon those of the states. Stewart v. McHarry, 159 U. S. 643, 16 Sup. Ct. 117, 40 L. Ed. 290. Among the questions of fact finally determinable by the land department may be mentioned the following, as examples: Whether given lands are "swamp and overflowed lands," within the meaning of an act of congress (Heath v. Wallace, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063); whether given lands are "unfit for cultivation" (United States v. Budd, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384); whether or not certain lands in question are within the description of "mineral lands" (Buena Vista Petroleum Co. v. Tulare Oil & Mining Co. [C. C.] 67 Fed. 226); whether land is of such a character as to allow of a homestead entry. Johnson v. Bridal Veil Lumbering Co., 24 Or. 182, 33 Pac. 528.

[136] Puget Mill Co. v. Brown (C. C.) 54 Fed. 987; Parsons v. Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669.

[137] Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424; Glidden v. Union Pac. R. Co. (C. C.) 30 Fed. 660; Southern Pac. R. Co. v. Wiggs (C. C.) 43 Fed. 333; Tate v. Carney, 24 How. 357, 16 L. Ed. 693; Hartman v. Smith, 7 Mont. 19, 14 Pac. 648; Tatro v. French, 33 Kan. 49, 5 Pac. 426; Hosmer v. Wallace, 47 Cal. 461; Hess v. Bolinger, 48 Cal. 349; Shelton v. Keirn, 45 Miss. 106. But the decisions of the officers of the land department are not reviewable for mere errors of judgment upon the weight of evidence in a contested case before them. Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424.

[138] United States v. Winona & St. P. R. Co., 15 C. C. A. 96, 67 Fed. 948.

[139] Aurora Hill Con. Min. Co. v. Eighty-Five Min. Co. (C. C.) 34 Fed. 515.

of law and fact to be determined by the land department, and the court cannot separate it so as to ascertain what error of law was committed, the decision of the department will be accepted as conclusive.[140]

A patent to land, issued by the proper office of the federal government, is both a conveyance and an adjudication upon the right of the patentee. Hence when no question is successfully made as to the jurisdiction of the officers of the land department, a patent issued by them is final and conclusive evidence of title in all proceedings at law. It cannot be impeached or attacked collaterally, nor directly in any court of law, although a court of equity may grant relief where fraud is shown.[141]

But in order that the rulings of the land office should be entitled to the character and effect of res judicata, it is vitally necessary that they should have kept strictly within their jurisdiction. If, for example, they had no jurisdiction or authority to issue a particular patent, —either because the sale of the land was not authorized by law, or it had been reserved from sale, or already patented to another, for any other reason,—the patent is void and may be collaterally impeached in an action at law.[142] It is also an important and well-settled

[140] Marquez v. Frisbie, 101 U. S. 473, 25 L. Ed. 800.

[141] Meader v. Norton, 11 Wall. 442, 20 L. Ed. 184; St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875; United States v. Marshall Silver Min. Co., 129 U. S 579, 9 Sup. Ct. 343, 32 L. Ed. 734; Barden v. Northern Pac. R. Co., 154 U. S. 288, 14 Sup. Ct. 1030, 38 L. Ed. 992; United States v. Winona & St. P. R. Co., 15 C. C. A. 96, 67 Fed. 948; Turner v. Donnelly, 70 Cal. 597, 12 Pac. 469; Green v. Barker, 47 Neb. 934, 66 N. W. 1032; Hosmer v. Wallace, 47 Cal. 461; Boyce v. Danz, 29 Mich. 146; Ferry v. Street, 4 Utah, 521, 11 Pac. 571; Sanford v. Sanford, 19 Or. 1, 13 Pac. 602; Lamont v. Stimson, 3 Wis. 545, 62 Am. Dec. 696; Webber v. Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469; Pin v. Morris, 1 Or. 230; Mitchell v. Cobb, 13 Ala. 137; Ard v. Pratt, 43 Kan. 419, 23 Pac. 646; Kinney v. Degman, 12 Neb. 237, 11 N. W. 318.

[142] Wilcox v. Jackson, 13 Pet. 511, 10 L. Ed. 264; Davis v. Weibbold, 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844; United States v. Winona & St. P. R. Co., 15 C. C. A. 96, 67 Fed. 948; Knight v. United Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974; Sherman v. Buick, 93 U. S. 209, 23 L. Ed. 849; Foss v. Hinkell, 78 Cal. 158, 20 Pac. 393; St. Louis Smelting & Refining Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875; Northern Pac. R. Co. v. McCormick, 19 C. C. A. 165, 72 Fed. 736; Webber v. Pere Marquette

rule that when the grant of a patent from the land office has been procured through fraud, mistake, imposition, or misconstruction of the law of the case, the United States, or any contesting claimant for the land, may have relief in a court of equity.[148] But the fraud

Boom Co., 62 Mich. 626, 30 N. W. 469; Danforth v. Morrical, 84 Ill. 456; Havard v. Atkins, 24 La. Ann. 511; Doe v. Watts, 7 Smedes & M. (Miss.) 363, 45 Am. Dec. 308; Cummings v. Powell, 116 Mo. 473, 21 S. W. 1079, 38 Am. St. Rep. 610; Ferry v. Street, 4 Utah, 521, 11 Pac. 571; Kean v. Roby (Ind.) 42 N. E. 1011; Crapo v. Township of Troy, 98 Mich. 635, 57 N. W. 806; Silver Bow Min. & Mill. Co. v. Clark, 5 Mont. 378, 5 Pac. 570; Schwenke v. Union Depot & R. Co., 7 Colo. 512, 4 Pac. 905.

[148] Lytle v. Arkansas, 22 How. 193, 16 L. Ed. 306; Garland v. Wynn, 20 How. 6, 15 L. Ed. 801; Johnson v. Towsley, 13 Wall. 72, 20 L. Ed. 485; Moore v. Robbins, 96 U. S. 535, 24 L. Ed. 848; United States v. Minor, 114 U. S. 233, 5 Sup. Ct. 836, 29 L. Ed. 110; United States v. Beebe, 127 U. S. 338, 8 Sup. Ct. 1083, 32 L. Ed. 121; United States v. San Jacinto Tin Co., 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747; Quinby v. Conlan, 104 U. S. 420, 26 L. Ed. 800; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; United States v. Maxwell Land-Grant Co., 121 U. S. 325, 7 Sup. Ct. 1015, 30 L. Ed. 949; Sanford v. Sanford, 139 U. S. 642, 11 Sup. Ct. 666, 35 L. Ed. 290; Germania Iron Co. v. United States, 7 C. C. A. 256, 58 Fed. 344; United States v. Winona & St. P. R. Co., 15 C. C. A. 96, 67 Fed. 948; United States v. Williams (C. C.) 30 Fed. 309; United States v. Rose (C. C.) 24 Fed. 196; Wynn v. Garland, 16 Ark. 440; Bisson v. Curry, 35 Iowa, 72; State v. Bachelder, 5 Minn. 223 (Gil. 178), 80 Am. Dec. 410; Corbett v. Wood, 32 Minn. 509, 21 N. W. 734; Empey v. Plugert, 64 Wis. 603, 25 N. W. 560; Lamont v. Stimson, 3 Wis. 545, 62 Am. Dec. 696; Rogers v. Brent, 10 Ill. 573, 50 Am. Dec. 422; Porter v. Bishop, 25 Fla. 749, 6 South. 863; Doe v. Watts, 7 Smedes & M. (Miss.) 363, 45 Am. Dec. 308. In the case of Johnson v. Towsley, supra, it is said that, when a special tribunal is authorized to hear and determine certain matters arising in the course of its duties, its decisions within the scope of its authority are conclusive. On this principle, the action of the land department in issuing a patent for land is conclusive in all courts, and in all proceedings, where, by the rules of law, the legal title must prevail. But courts of equity, both in England and in this country, have always had the power in certain classes of cases to inquire into and correct injustice and wrong, in both executive and judicial action, founded in fraud, mistake, or other special ground of equity, when private rights are invaded. In this manner the most solemn judgments of courts of law have been annulled, and patents and other important instruments issuing from the crown or other executive branch of the government have been reformed, corrected, declared void, or other appropriate relief granted. The land office, dealing as it does with private rights of great value in a manner where it is particularly liable to be imposed upon by fraud, false swearing, and mistakes, exemplifies the value and the necessity of this equitable jurisdiction. If a patent has been obtained by

for which a patent may be cancelled or set aside is such as is extrinsic or collateral to the matters contested, and not a fraud which was in issue before the land department.[144] The right of the United States to bring suit to set aside or cancel a patent for land issued in its name, for fraud or mistake, exists only when the government has an interest in the remedy sought by reason of its interest in the land, or when the fraud has been practised on the government and operates to its prejudice, or when it is under some obligation to some individual to make his title good by setting aside the fraudulent patent, or the duty of the government to the public requires such action. When it is apparent that the only purpose of bringing the suit is to benefit one of two claimants to the land, and the government has no interest in the matter, the suit must fail.[145] Further, patents will not be set aside on the ground of fraud, unless the proof of fraud is clear and strong.[146] And when the United States sues for the cancellation of a patent, it must assume the burden of proving the fraud charged, even though this involves proving a negative.[147]

fraud and perjury, the successful claimant will be regarded in equity as trustee for the true owner, who may, by proper proceedings in equity, compel a conveyance to himself of the legal title. Plummer v. Brown, 70 Cal. 544, 12 Pac. 464; Lamont v. Stimson, 3 Wis. 545, 62 Am. Dec. 696; Parsons v. Venzke, 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669; Boyce v. Danz, 29 Mich. 146.

[144] United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93; United States v. San Jacinto Tin Co. (C. C.) 23 Fed. 279; United States v. White (C. C.) 17 Fed. 561. And "it is not enough that fraud and imposition have been practised upon the department, or that false testimony or fraudulent documents have been presented; it must appear that they affected the determination, which, otherwise, would have been in favor of the plaintiff." Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570.

[145] United States v. San Jacinto Tin Co., 125 U. S. 273, 8 Sup. Ct. 850, 31 L. Ed. 747. See United States v. Iron Silver Min. Co. (C. C.) 16 Fed. 810; San Pedro & C. Co. v. United States, 146 U. S. 120, 13 Sup. Ct. 94, 36 L. Ed. 911; United States v. Missouri, K. & T. Ry. Co., 141 U. S. 358, 12 Sup. Ct. 13, 35 L. Ed. 766.

[146] United States v. Budd, 144 U. S. 154, 12 Sup. Ct. 575, 36 L. Ed. 384.

[147] Colorado Coal & Iron Co. v. United States, 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182.

§ 531. Rulings of Government Officials.

By an extension of the principle of res judicata, from its strict application to the judgments of the courts, the conclusive effect of a judgment has been accorded to the rulings of certain officials of the general government, when exercising functions which are judicial in their nature. Thus the decision of the United States commissioner of patents, in granting or extending a patent, cannot be attacked collaterally for fraud and imposition practised upon him, but only in a direct suit to impeach and set aside the patent.[148] So also, rulings made by the comptroller of the currency, upon matters within his special jurisdiction in respect to the national currency, are held binding in collateral inquiries.[149] But it has been said that the decision of the secretary of the interior, that a pre-emption claim is valid, is not an estoppel upon one who contested the same, not as a pre-emption claimant, but claiming under an act of congress donating land to a state, even if it is binding upon contesting claimants of the right to pre-emption.[150] The appraisement and liquidation of customs-duties by the appraiser and collector are considered binding and conclusive in all collateral proceedings, and in the absence of any re-liquidation or re-appraisement, cannot be disregarded or reviewed except in the modes provided in the statutes; a suit in the district court is not one of those modes.[151]

[148] Eureka Clothes Wringing Mach. Co. v. Bailey Washing & Wringing Mach. Co., 11 Wall. 488, 20 L. Ed. 209; Providence Rubber Co. v. Goodyear, 9 Wall. 788, 19 L. Ed. 566.

[149] Casey v. Galli, 94 U. S. 673, 24 L. Ed. 168, 307. In New York, it is held that the decision of a superintendent of the banking department of the state, in refusing an application for a certificate of compensation alleged to be due to a special bank examiner, is binding on a succeeding superintendent, in case of a second application by the same person on the same state of facts, as res judicata of the claim in question. People v. Preston, 62 Hun, 185, 16 N. Y. Supp. 488.

[150] Megerle v. Ashe, 33 Cal. 74.

[151] United States v. McDowell (D. C.) 21 Fed. 563.

§ 532. Boards of Municipal Officers.

On the principles laid down in the preceding sections, the character of conclusiveness attaches to the rulings made by certain boards or officers of municipal corporations. Thus, when the statutes commit to a board of county commissioners or supervisors or auditors, or to a town council, the duty of examining and auditing claims against the municipality, their action in auditing, adjusting, allowing, or rejecting such a claim is judicial in its nature, and their decision is binding and conclusive unless reversed on appeal.[152] "The acts of a board of audit, within its jurisdiction, in the absence of fraud or collusion, are final and conclusive, and cannot be questioned in a collateral proceeding. Whether the claim is a proper town or county charge, in a case where it is doubtful and rests upon disputed evidence, and what amount shall be allowed, when not fixed by statute, are questions which the statute commits to the determination of the board of audit, and however much it may err in judgment upon the facts, so long as it keeps within its jurisdiction and acts in good faith, its audit cannot be overhauled, but is final as well to the tax-payers as to the claimant." [153] So also, road commissioners, in adjudicating upon the necessity of a road and in locating and making assessments for the same, act judicially; the records of their proceedings and judgments are entitled to the same respect as the records and judgments of other tribunals, so long as they act within their jurisdiction, and cannot be attacked collaterally.[154] But in Indiana, and possibly elsewhere, a board of city commissioners, appointed under a statute in relation to the laying out of streets in cities, and charged with the

[152] Osterhoudt v. Rigney, 98 N. Y. 222; Placer County v. Campbell (Cal.) 11 Pac. 602; Colusa Co. v. De Jarnett, 55 Cal. 375; Carroll v. Board of Police of Tishamingo County, 28 Miss. 38; Kelly v. Wimberly, 61 Miss. 548; State v. Board of Com'rs of Buffalo County, 6 Neb. 454; Maxwell v. Board of Com'rs of Fulton County, 119 Ind. 20, 19 N. E. 617; Sioux County v. Jameson, 43 Neb. 265, 61 N. W. 596; Longinette v. Shelton (Tenn. Ch.) 52 S. W. 1078. Compare Board of Com'rs of Jackson County v. Nichols, 12 Ind. App. 315, 40 N. E. 277, 54 Am. St. Rep. 528; Chapman v. State, 104 Cal. 690, 38 Pac. 457.

[153] Osterhoudt v. Rigney, 98 N. Y. 222.

[154] Longfellow v. Quimby, 29 Me. 196, 48 Am. Dec. 525. Compare Winchester v. Board of Com'rs of Cecil County, 78 Md. 266, 27 Atl. 1075.

assessment of benefits and damages to property-owners, do not constitute a court, nor have their reports the effect of judgments.[155] Where the law has committed to the common council of a city the duty of canvassing the returns and from them determining the result of an election, and the council has performed that duty and made their determination, the question as to the effect of the returns made is not open for determination by a jury in an action in which the title of the officer to his office comes up collaterally. "If the question had arisen in an action in the nature of a quo warranto information, the evidence would have been competent. But it would be intolerable to allow a party affected by the acts of a person claiming to be an officer, to go behind the official determination to prove that such official determination arose out of mistake or fraud."[156] Where a board of commissioners of police are invested with jurisdiction to try members of the police force of a city for immoral or disorderly conduct, their judgment that a policeman has been guilty of such conduct is conclusive until reversed.[157] In England, on similar principles, orders of the commissioners of sewers, requiring land-owners to repair and alter sea-walls, may be given in evidence as adjudications by a court of competent jurisdiction, without proof of their having been acted upon.[158]

§ 533. Judgments Conclusive on Habeas Corpus.

The conclusive and irrefragable character of a judgment when it is brought in question in proceedings by habeas corpus, has been clearly stated by the supreme court of Pennsylvania in the following language: "On a habeas corpus the judgment even of a subordinate state court cannot be disregarded, reversed, or set aside, however clearly we may perceive it to be erroneous, and however plain it may be that we ought to reverse it if it were before us on appeal or writ of error. We can only look at the record to see whether a judgment exists, and have no power to say whether it is right or wrong. It

155 City of Elkhart v. Simonton, 71 Ind. 7.
156 Hadley v. Mayor, etc., of City of Albany, 33 N. Y. 603, 88 Am. Dec. 412.
157 Queen v. City of Atlanta, 59 Ga. 318.
158 Regina v. Leigh, 10 Adol. & E. 398.

is conclusively presumed to be right until it is regularly brought up for revision. . . . . But the rule is so familiar, so universally acknowledged, and so reasonable in itself, that it requires only to be stated. It applies with still greater force, or at least for much stronger reasons, to the decisions of the federal courts. Over them we have no control at all, under any circumstances, or by any process that could be devised."[159] The proceedings on habeas corpus in the federal courts are not governed by the laws of the states on that subject, but by the common law of England as it stood at the adoption of the constitution, subject to such alterations as congress may prescribe; and under that system, a decision under one writ, refusing the discharge of a prisoner, is no bar to the issuing of any number of other successive writs by any court or magistrate having jurisdiction.[160] We have already treated of the collateral impeachment of judgments by habeas corpus proceedings, and the limitations under which the validity of the sentence may be thus inquired into.[161]

PART IV. OF THE PERSONS CONCLUDED BY JUDGMENTS.

§ 534. Parties and Privies.

To state the rule in its most general form, we may say that judgments and decrees are conclusive evidence of facts only as between parties and privies to the litigation.[162] And, in the case of a former adjudication set up in defense, it is no bar unless the parties to the

[159] Williamson's Case, 26 Pa. 9, 17, 67 Am. Dec. 374. See, also, Doyle v. Commonwealth, 107 Pa. 20; State v. Bechdel, 37 Minn. 360, 34 N. W. 334, 5 Am. St. Rep. 854; Ex parte Adams, 25 Miss. 883, 59 Am. Dec. 234; In re Graham, 74 Wis. 450, 43 N. W. 148, 17 Am. St. Rep. 174; In re Gut Lun, 83 Fed. 141; State v. Adler, 67 Ark. 469, 55 S. W. 851; In re Sneden, 105 Mich. 61, 62 N. W. 1009, 55 Am. St. Rep. 435; Ex parte Stephen, 114 Cal. 278, 46 Pac. 86; In re Graham, 7 Wash. 237, 34 Pac. 931. Compare Bradley v. Beetle, 153 Mass. 154, 26 N. E. 429.

[160] Ex parte Kaine, 3 Blatchf. 1, Fed. Cas. No. 7,597.

[161] Supra, vol. 1, §§ 254–259.

[162] Day v. Combination Rubber Co., 2 Fed. 570; Ainslie v. Mayor of City of New York, 1 Barb. (N. Y.) 168; In re Lightner's Estate, 187 Pa. St. 237, 41 Atl. 46; Ellis v. Crowl, 46 Kan. 100, 26 Pac. 454; Jarrell v. Brubaker, 150 Ind. 260, 49 N. E. 1050; Heffron v. Knickerbocker, 51 Ill. App. 291; Fuller v. Brownell, 48 Neb. 145, 67 N. W. 6.

first judgment are the same as those to the second proceeding.[163] On the principle that estoppels must be mutual, no person is entitled to take advantage of a former judgment or decree, as decisive in his favor of a matter in controversy, unless, being a party or privy thereto, he would have been prejudiced by it had the decision been the other way.[164] Further, a valid and subsisting judgment is conclusive against each party,—against the defendant, that the amount adjudged is due, and against the plaintiff, that no more is due on account of the contract or liability put in suit.[165] Now it becomes important to inquire, who are considered parties to a litigation in such sense as to be bound by the decision therein? According to the definition first formulated by a leading writer on Evidence, and followed in many cases, "those are held to be parties who have a right to control the proceedings, to make defense, to adduce and cross-examine the witnesses, and to appeal from the decision if any appeal lies."[166] The classification proposed by a learned judge in Georgia is also worth quoting here. It is as follows: "Under the term 'parties' the law includes all who are interested in the subject-matter of litigation, who will be gainers or losers by its result, and for or against whom the record of the former proceedings might be adduced in evidence in another trial; those who have the right to be heard, and to offer testimony and examine the witnesses. 'Privies' are those who are so connected with the parties in estate, or in blood, or in law, as to be identified with them in interest, and consequently to be affected with them by the litigation, as lessor and lessee, heir and ancestor, executor

[163] Degelos v. Woolfolk, 21 La. Ann. 706.

[164] Appeal of Chandler's Ex'r, 11 Wkly. Notes Cas. 421. See, infra, § 548. But in considering whether an issue is res judicata, it is immaterial that such issue was raised in the former suit by the party who now insists that it is concluded by the judgment, or that he supported the issue by evidence and induced the court to rule and charge in his favor on it. Brown v. Tillman, 121 Ala. 626, 25 South. 836.

[165] Bank of Mobile v. Mobile & O. R. Co., 69 Ala. 305. Where there are several plaintiffs, and a decree is made in favor of some of them only, it is conclusive that the others are not entitled to relief, though it does not expressly so declare, where it is clearly inferable, from the decree as a whole, that such was the intention of the judge who framed it. H. B. Claflin Co. v. De Vaughn, 106 Ga. 282, 32 S. E. 108.

[166] 1 Greenl. Ev. § 535; Peterson v. Lothrop, 34 Pa. 223; Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626.

and testator. All others not included in either of these classes are of course strangers." [167] A disposition is manifest in some of the authorities to require record evidence of the connection of a party with the suit. "Parties to a judgment are those whose names appear upon the record as plaintiff and defendant." [168] "To ascertain the extent of the effect of a judgment or decree, in relation either to the matters thereof or parties thereto, the record of the suit in which it may have been rendered or pronounced should be explored. It affords the information most, if not solely, to be relied upon, in the progress of such an inquiry. The law imputes to the record absolute verity, and will not permit the matter which it imports to be gainsaid or traversed. . . . . And hence results (as we believe) the rule that none are to be considered as parties to a suit, and bound in that character by a judgment or decree therein, but those who are named as such in the record thereof." [169] While it is true that, in the majority of cases, the record will furnish all necessary information as to the parties to the prior proceeding, and while undoubtedly it should be consulted in all cases, the above statement of the rule cannot be accepted without important qualifications. For, in the first place, it may happen that a party is sued by a wrong name. Yet if he is rightly served, and makes no objection to the misnomer, and is afterwards connected with the record by proper averments, he will be conclusively bound by the judgment.[170] And in the second place, as will appear more fully in succeeding sections, persons often connect themselves with a suit, by actively assuming the prosecution or defense, and thereby become bound by the result of the litigation, although not appearing on the record. But with such exceptions as these, it is generally true that the record-parties are those who are estopped by the judgment. It is also to be remarked that the adjudication of a matter in a suit in which a person is named as a party, but of whose person the court acquires no jurisdiction, by service of pro-

[167] Brown v. Chaney, 1 Kelly (Ga.) 412, Lumpkin, J. Further as to the question who are privies, see infra, § 549.

[168] Same's Appeal, 26 Pa. 184; Walters v. Wood, 61 Iowa, 290, 16 N. W. 116.

[169] Allin v. Hall's Heirs, 1 A. K. Marsh. (Ky.) 525.

[170] Barry v. Carothers, 6 Rich. Law (S. C.) 331. See McCormick v. Brannan, 24 Pa. Co. Ct. R. 497. And see, supra, vol. 1, § 213.

cess or otherwise, cannot be considered as res judicata as to such person.[171]

§ 534a. Judgment as Estoppel against United States or State.

While there are cases in which it may be questioned whether the government will be concluded by an estoppel in pais, and while there are varying decisions as to whether it will be bound by an estoppel by deed, it has never been successfully contended that the United States would not be subject, like any ordinary suitor, to the principle of res judicata when it voluntarily goes into the courts as a litigant.[172] The rule is the same in regard to a state. When a state invokes the judgment of a court for any purpose, it lays aside its sovereignty and consents to be bound by the decision of the court, whether such decision be favorable or adverse, since the state is bound by the doctrine of res judicata to the same extent as any private litigant.[173] Thus, a judgment in a suit for the collection of taxes operates as an estoppel against the state, or any agency of the state, in suits concerning the same taxes or those subsequently accruing under the same statute.[174] A more difficult question arises when we inquire whether a state will be bound by a judgment against one of its municipal corporations, concerning public interests, property, or rights. Ordinarily, it would appear, such a judgment will be conclusive only on the corporation immediately involved in the suit.[175] But in California, it is held that, where a municipal corporation is endowed with full power and jurisdiction over the public parks within its territory, a judgment adverse to the corporation, in a suit prosecuted by it, wherein it claims the legal title to land as

[171] Garrigue v. Arnott, 80 Ill. App. 24; Shaefer v. Gates, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164.

[172] Fendall v. United States, 14 Ct. Cl. 247; United States v. O'Grady, 22 Wall. 641, 22 L. Ed. 772; Atlantic Dredging Co. v. United States, 35 Ct. Cl. 463. Compare The John Shillito Co. v. McClung, 2 C. C. A. 526, 51 Fed. 868.

[173] State v. Kennedy, 60 Neb. 300, 83 N. W. 87; City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; People v. Linda Vista Irr. Dist., 128 Cal. 477, 61 Pac. 86.

[174] Stone v. Bank of Kentucky, 174 U. S. 799, 19 Sup. Ct. 881, 43 L. Ed. 1187; Bank of Kentucky v. Stone, 88 Fed. 383; Bridge Co. v. Douglass, 12 Bush (Ky.) 673.

[175] See People v. Loeffler, 175 Ill. 585, 51 N. E. 785.

part of a public park and as trustee of the people of the state, will be a bar to any subsequent action by the people of the state for the same land.[176] But the state cannot be bound by a judgment between private parties, although a question affecting the public was adjudicated therein, as, whether the land in controversy was public land of the state or not.[177] A municipal corporation is not in any sense sovereign; and such a corporation is as fully bound by a judgment for or against it, in any suit to which it was a party, as a private person would be.[178] But of course it is not estopped by a judgment for or against another municipal corporation of the same state, though the same question is at issue.[179]

§ 535. Persons under Disabilities.

Whether a judgment is binding and conclusive as an estoppel upon a married woman, an infant, or a lunatic, will depend upon the question whether a judgment against such a person is to be considered valid, voidable, or void. If it is a mere nullity, it has no force or virtue whatever as evidence or as a bar. But otherwise, no matter how irregular or erroneous, it must be held conclusive in all other proceedings, until duly reversed or set aside. The validity of such judgments was discussed in detail in an earlier chapter.[180]

[176] People v. Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; Id., 102 Cal. 661, 36 Pac. 927. And see People v. Beaudry, 91 Cal. 213, 27 Pac. 610.

[177] Platt v. Vermillion, 39 C. C. A. 555, 99 Fed. 356. Judgment in an action between citizens to test the constitutionality of a statute is not res judicata, as to the validity of such act, in a subsequent action by the state. Denney v. State, 144 Ind. 503, 42 N. E. 929, 31 L. R. A. 726.

[178] Illinois Cent. R. Co. v. City of Champaign, 163 Ill. 524, 45 N. E. 120.

[179] In a suit by a bank to enjoin a county from collecting a tax, an adjudication that the bank had an irrevocable contract with the state for exemption from such taxes is not conclusive, in a subsequent suit involving the right of other counties to collect taxes from the bank under the same statute. Northern Bank of Kentucky v. Stone, 88 Fed. 413.

[180] As to married women, see supra, vol. 1, §§ 188–192; Ketchum v. Christman, 128 Mo. 38, 30 S. W. 313; Nave v. Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421. As to infants, see vol. 1, §§ 193–198; as to insane persons, § 205.

§ 536. Party bound only in the Capacity in Which he Appears.

It is not only necessary that the person sought to be bound by the former judgment should have been a party to both actions, but he must have appeared in both in the same capacity or character.[181] "A judgment against a party sued as an individual is not an estoppel in a subsequent action in which he sues or is sued in another capacity or character. In the latter case he is in contemplation of law a distinct person and a stranger to the prior proceedings and judgment."[182] This rule is one of the fundamentals of the jurisprudence of the subject. For it is found in the Roman law,[183] as well as our own, and is also a familiar principle of the modern French and other continental systems.[184] To proceed to illustrations of the rule: —a plea of former adjudication which shows that the party sought to be estopped in his individual capacity had sued in the former case in the character of guardian or next friend, is bad on demurrer unless it also shows that the merits of the case, as to such party individually, were in some way involved in the issues and determined by the prior judgment.[185] So, a judgment against one sued in his individual capacity, and who, as an individual, disclaims any interest in the property in controversy, will not estop him to claim the property in the capacity of a trustee of others, for whom he held it when the suit

[181] Robinson's Case, 5 Co. 32b; Fenwick v. Thornton, Mood. & M. 51; Leggett v. Great Northern Ry. Co., 1 Q. B. Div. 599; Lander v. Arno, 65 Me. 26; Davis v. Davis, 30 Ga. 296; Sample v. Coulson, 9 Watts & S. (Pa.) 62; Brooking v. Dearmond, 27 Ga. 58; Erwin v. Garner, 108 Ind. 488, 9 N. E. 417; Mansfield v. Hoagland, 46 Ill. 359; Stoops v. Woods, 45 Cal. 439.

[182] Rathbone v. Hooney, 58 N. Y. 463; Jennings v. Jones, 2 Redf. Sur. (N. Y.) 95.

[183] "The third requisite to the exceptio rei judicatæ is that the person who demands the same thing as before should demand it in the same quality, and that the demand should also be made from the defendant in the same quality as before." 1 Evans Poth. Obl. p. 556.

[184] Code Civil, art. 1351; Marcadé, Explication du Code Napoléon, t. 5, pp. 175–180.

[185] McBurnie v. Seaton, 111 Ind. 56, 12 N. E. 101; Gerstein v. Fisher, 12 Misc. Rep. 211, 33 N. Y. Supp. 1120; Furlong v. Banta, 80 Hun, 248, 29 N. Y. Supp. 985. See Baker v. Flint & P. M. R. Co., 91 Mich. 298, 51 N. W. 897, 16 L. R. A. 154, 30 Am. St. Rep. 471.

was commenced.[186] A judgment for trespass in cutting trees on lands of a church, recovered by one who sued as a deacon of the church, cannot be pleaded by defendant in bar of an action for the same trespass by the trustees of the church.[187] Again, the judgment rendered in an action in which one of the parties appeared in the capacity of an executor or administrator is not binding upon him in a subsequent suit, in which he appears in his private and individual capacity, or as an heir, legatee, or trustee under the will, or vice versa, unless it appears that the rights claimed by him in the second action were actually put in issue and litigated in the former suit.[188] For the same reason, a judgment in an action for property against a party suing as the heir of one person is not a bar to another action by the same party, for the same property, but claiming in a different right, as the heir of another person.[189] So, a decree in chancery affecting the rights of legatees of a decedent is not binding upon them as his heirs at law, in a subsequent action of ejectment against them.[190] On similar principles, an equity of redemption owned by an assignee in bankruptcy, as such, is not barred by a foreclosure in which he is made a party, is served, and appears, in his individual name only, and in which his official character is in no way mentioned.[191] Again, a judgment by default against a garnishee, where no issue was made

[186] Sonnenberg v. Steinbach, 9 S. D. 518, 70 N. W. 655, 62 Am. St. Rep. 885.

[187] Allison v. Little, 93 Ala. 150, 9 South. 388.

[188] Carey v. Roosevelt, 43 C. C. A. 320, 102 Fed. 569; Hall v. Richardson, 22 Hun, 444; In re Yetter, 44 App. Div. 404, 61 N. Y. Supp. 175; Appeal of Clarke, 70 Conn. 195, 39 Atl. 155; Gibson v. Willis (Tenn. Ch. App.) 36 S. W. 154; Sutton v. Read, 176 Ill. 69, 51 N. E. 801. See Braswell v. Hicks, 106 Ga. 791, 32 S. E. 861.

[189] Caruth v. Grigsby, 57 Tex. 259; Downing v. Diaz, 80 Tex. 436, 16 S. W. 49; Kitts v. Willson, 140 Ind. 604, 39 N. E. 313; Melton v. Pace, 103 Tenn. 484, 53 S. W. 939; Pollock v. Cox, 106 Ga. 430, 34 S. E. 213; Johnson v. Graves, 129 Ind. 124, 28 N. E. 315.

[190] Wooster v. Fitzgerald, 61 N. J. Law, 687, 40 Atl. 599.

[191] Landon v. Townshend, 112 N. Y. 93, 19 N. E. 424, 8 Am. St. Rep. 712; Id., 129 N. Y. 166, 29 N. E. 71. Judgment against a plaintiff in an action by him in his representative capacity, as trustee for creditors, to set aside a conveyance as in fraud of creditors, based on the ground that the conveyance was free from fraud, is not conclusive against him on the question of fraud, in an action by him individually on his own account merely, against the same defendant for the same purpose. Collins v Hydron, 135 N. Y. 320, 32 N. E. 69.

as to the garnishee's right to the property in question in the capacity of an assignee for the benefit of creditors, is not binding upon him in a subsequent action which he brings as such assignee, to recover the value of the property.[192] So, if a person is interested in the subject-matter of a suit in two capacities, the one as trustee in one deed of trust, and the other as beneficiary in another deed of trust, both securities being upon the same property, and he is made a party to a suit brought to set aside the latter trust deed, in which no reference is made to him as trustee in the other deed, he will not be regarded as a party to said suit in his capacity as trustee in the former deed.[193] Where suit is brought against a sheriff for taking certain goods, and he justifies under an execution in favor of A., this is no bar to a second suit, by the same plaintiff for the same goods, in which the sheriff justifies under an execution in favor of B. Though a party to both suits, he is not a party in respect to the same interest in the two.[194] Again, a judgment in a mandamus proceeding against a corporate board, compelling them to restore a discharged workman to his employment on the ground that the discharge was in violation of law, is not res judicata in an action of tort by the workman against the members of the board individually for damages for his dismissal.[195]

But it may sometimes happen that all the interests of the party, in his several capacities, are before the court in the same litigation; and in that case, the reason of the rule ceases, and he is bound in all characters.[196] Thus, a decree in a suit brought by an executor in his own right, but to which he was a necessary party as executor, and in which the rights of his testator were adjudicated, is conclusive between the administrator de bonis non and the other parties to it,

[192] Schneider-Davis Co. v. Brown (Tex. Civ. App.) 46 S. W. 108. See Santleben v. Alamo Cement Co. (Tex. Civ. App.) 25 S. W. 143.

[193] McNutt v. Trogdon, 29 W. Va. 469, 2 S. E. 328. A person suing as a stockholder of a corporation is not estopped by a decree in a prior suit, brought by him as trustee of a mortgage. Henry v. Pittsburgh, C., C. & St. L. Ry. Co., 2 Ohio N. P. 118.

[194] Stoops v. Woods, 45 Cal. 439.

[195] Nuttall v. Simis, 22 Misc. Rep. 19, 47 N. Y. Supp. 1097.

[196] See Cornell v. Green, 43 Fed. 105; Colt v. Colt, 48 Fed. 385; Brown v. Howard, 92 Fed. 537; Heyl v. Donifelser, 59 Kan. 779, 54 Pac. 1059; Sparks v. Etheredge, 89 Ga. 790, 15 S. E. 672.

and cannot be re-examined in a subsequent suit between them.[197] And so, if a devisee of land, in possession thereof pending the settlement of the testator's estate, be also the executrix of the testator's will, a recovery in an action by her in her own name, for trespass to the land, is a bar to her recovery for the same cause of action in her capacity as executrix.[198] If one sues as trustee, and afterwards in his individual capacity in respect of the same subject-matter, he is bound by the decree in the former suit. For if, at that time, he owned the subject of the trust, he was representing himself; and if he bought it afterwards, he is a privy to the person who was represented.[199]

§ 537. Nominal and Real Parties.

It is not always necessary that the parties to the two suits should be nominally the same, in order that one recovery may bar another; it is in general sufficient if they are really and substantially in interest the same.[200] So to render a decree conclusive upon a person it need not be against him particularly by name; it is enough if it is adverse to his interest.[201] For instance, the lessor of the plaintiff is the real party in a common law action of ejectment, and the nominal plaintiff has no interest, and consequently, in an ejectment brought by Doe on the demise of J. S. against B., J. S. is bound by a judgment for the defendant.[202] So the equitable assignee of a chose in action is estopped by the verdict and judgment thereon, in the same manner as if he were a party to the record; because, though not nominally

[197] Manigault v. Holmes, 1 Bailey, Eq. (S. C.) 283.

[198] Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556, citing Stewart v. Montgomery, 23 Pa. 412; Atherton v. Atherton, 2 Pa. 112. And see Comm. v. Cochran, 146 Pa. 223, 23 Atl. 203.

[199] Corcoran v. Chesapeake & Ohio Canal Co., 94 U. S. 741, 24 L. Ed. 190. And see Daniel v. Gum (Tenn.) 45 S. W. 468.

[200] Follansbee v. Walker, 74 Pa. 306; Manly v. Kidd, 33 Miss. 141; Verplanck v. Van Buren, 76 N. Y. 247; Lowry v. McMurtry, Sneed (Ky.) 251; Wright v. Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; Hoppin v. Avery, 87 Mich. 551, 49 N. W. 887; McClesky v. State, 4 Tex. Civ. App. 322, 23 S. W. 518; Bass Foundry & Machine Works v. Board of Com'rs of Parke County, 141 Ind. 68, 32 N. E. 1125.

[201] Taylor v. Cornelius, 60 Pa. 187; Johnston's Devisees v. Churchills, Litt. Sel. Cas. (Ky.) 177; Wiswall v. Sampson, 14 How. 52, 14 L. Ed. 322.

[202] Wright v. Tatham, 1 Adol. & El. 3, 19.

a plaintiff or defendant, the suit is for or against his interest.[203] An analogous principle governed the decision of the case of Foust v. City of Huntington.[204] It was a suit for an injunction to restrain a city and its servants from extending street improvements on to the plaintiff's property, and the defendants filed a joint answer setting up a former adjudication, which answer was demurred to, because, of the present defendants, the city only was a party to the former suit, and the matter was not res judicata as to the others, and the answer, being joint, and bad as to them, was bad as to all. But it was held that the demurrer should be overruled, as the city was the real party in interest, and its rights being settled in the former case, the adjudication was conclusive as to its agents in making the improvements. Again, in a suit in which the government has no interest, but which is brought in its name by a private party, to enforce his own rights, a prior adjudication by a state court, determining the same issues adversely to him, is available as a defense, notwithstanding the formal presence of the United States as a party.[205] So, where a writ of prohibition was brought to prevent the judge of a city court from proceeding in a criminal case to enforce the collection of a tax, and, from the judgment entered, an appeal was taken, to which the city, being the real party in interest, became also a formal party, and the judgment was affirmed, it was held that this judgment was conclusive, in a subsequent proceeding, upon the city itself.[206] But where a devisee and proponent of the will assigned all her interest in the testator's estate to the plaintiff, agreeing to indemnify him against costs and charges of her attorney, and the plaintiff afterwards appeared and objected to her further prosecuting the probate of the will, but which, over his objection, was proceeded with, and the plaintiff was thereby compelled to pay the attorney's costs taxed therein, it was held that he was not a party to the proceeding so as to bar an action against her for breach of the contract.[207] And in general, where the principal parties and the thing demanded in the

[203] Rogers v. Haines, 3 Me. 362.

[204] 113 Ind. 139, 15 N. E. 337.

[205] United States v. Des Moines Val. R. Co., 28 C. C. A. 207, 84 Fed. 40.

[206] Stone v. Bank of Kentucky, 174 U. S. 408, 19 Sup. Ct. 881, 43 L. Ed. 1187. And see Keller v. City of Mt. Vernon, 23 App. Div. 46, 48 N. Y. Supp. 370.

[207] Dodge v. Zimmer, 110 N. Y. 43, 17 N. E. 399.

two suits are different, the judgment in one cannot be pleaded as res judicata in the other.[208]

§ 538. Use Plaintiff.

Where a suit is prosecuted by one person for the use of another, the latter being the assignee or equitable owner of the claim and the real party in interest, a judgment therein will bar a second suit by the latter in his own name.[209] So where suit on a note is prosecuted in the name of one, at the instance or for the benefit of another person, the adjudication will be conclusive as against such other person, not only as to what was determined in the suit, but also as to all other matters involved, or which could have been raised and determined in it.[210] Conversely, an action by one for the use of another will be barred by a prior recovery in a suit in which the present use plaintiff sued in his own name and behalf.[211] Where a mortgagee assigns the note and mortgage for the purpose of having the mortgage foreclosed by his assignee, and regains title thereto after a decree has been rendered against the assignee in the foreclosure suit, the decree is conclusive against him as to all matters which were or might have been litigated therein.[212] But if the plaintiff of record in the former suit had no real interest in the subject-matter of the

[208] White v. Gaines, 29 La. Ann. 769. A judgment in an action upon a written instrument against a plaintiff, who in no event could recover thereon, is not a bar to a subsequent action by the party in whom the right of action really lies. McLean v. Hansen, 37 Ill. App. 48.

[209] Sanders v. Peck, 30 C. C. A. 580, 87 Fed. 61; Gill v. United States, 7 Ct. Cl. 522; Curtis v. Bradley, 65 Conn. 99, 31 Atl. 591, 28 L. R. A. 143, 48 Am. St. Rep. 177; Citizens' Bank v. Miller, 45 La. Ann. 493, 12 South. 516. Where a water company assigns its contract to furnish the city with water, and then brings suit against the city on the contract for the use of the assignee, a judgment against it for costs is no bar to a subsequent suit on the same contract by the assignee. City of Carlyle v. Carlyle Water, Light & Power Co., 36 Ill. App. 28.

[210] Cheney v. Cross, 80 Ill. App. 640; Jackson v. West, 22 Tex. Civ. App. 483, 54 S. W. 297.

[211] Follansbee v. Walker, 74 Pa. 306.

[212] Cheney v. Patton, 144 Ill. 373, 34 N. E. 416. That a judgment in such a case may not be conclusive as between the assignor and the assignee of the mortgage see Winegard v. Fanning, 76 Hun, 170, 27 N. Y. Supp. 566. And see O'Connor v. Walter, 37 Neb. 267, 55 N. W. 867, 23 L. R. A. 650, 40 Am. St. Rep. 486.

litigation, either personally or as trustee of the title for the benefit of the true owner, so that he was not entitled to represent the latter for the purposes of the action, then the real owner will not be concluded by the result of the suit.[213]

§ 539. Stranger Promoting the Litigation.

"Extrinsic evidence is admissible to prove that a real party in a suit was not a party to the record, but that he prosecuted or defended the suit in the name of a nominal party; and whenever this is made to appear, the real party is concluded by the judgment as effectually as if he had been a party to the record." [214] Thus one who is benefited by the prosecution of an action of which he has notice is to be regarded as a party in interest although his name does not appear therein, and he is bound by the judgment rendered.[215] For instance, where controversy arises between an assignee of an insolvent and a purchaser of realty of the assigned estate, concerning the liability of the assignee to pay taxes thereon, and the purchaser employs counsel and procures the matter to be litigated to judgment in the name of the county treasurer, such judgment, as to the purchaser, is conclusive of the question.[216] So where a municipality, at the request of certain citizens, instituted legal proceedings to condemn land for a street, the citizens agreeing to pay all damages that might be assessed, and afterwards the city declined to pay the assessed damages, and in lieu thereof passed an ordinance declaring that the land sought to be condemned "be abandoned by the city," it was held that the persons who instigated the proceedings were concluded from

[213] Stephens v. Motl, 82 Tex. 81, 18 S. W. 99. See, also, Board of Trustees of School District No. 1 v. Whalen, 17 Mont. 1, 41 Pac. 849.

[214] Claflin v. Fletcher (C. C.) 7 Fed. 851; Roby v. Eggers, 130 Ind. 415. 29 N. E. 365; Lightcap v. Bradley, 186 Ill. 510, 58 N. E. 221; McDonald v. Western Refrigerating Co., 35 Ill. App. 283; Logan v. Trayser, 77 Wis. 579, 46 N. W. 877. A judgment is conclusive against an assignee of a chose in action, where he employed an attorney who brought suit thereon in the assignor's name with the assignee's consent. Cleveland v. Heidenheimer (Tex. Civ. App.) 44 S. W. 551.

[215] Conger v. Chilcote, 42 Iowa, 18.

[216] Burns v. Gavin, 118 Ind. 320, 20 N. E. 799.

asserting a prior dedication of the same land for public use as a street.[217]

§ 540. Person Assuming the Defense.

A person who is not made a defendant of record may still subject himself to be concluded by the result of the litigation, if he openly and actively, and in respect to some interest of his own, assumes the defense of the action.[218] Thus a judgment in ejectment will bind parties who voluntarily appear as defendants therein and file an answer, in which they deny the complainant's allegations, and allege ownership and right to possession of the premises sued for in themselves, although they were not named as parties in the complaint, nor served with summons, nor was the complaint amended to include their names, nor any order of court granted allowing them to appear.[219] So where the claimant of personalty sold by another assumes the defense of an action for the purchase-price brought by the vendor against the vendee, on the understanding that if the defense prevails the vendee will pay the claimant instead of the vendor, the judgment concludes the claimant's rights.[220] Again, where, in a suit against a guardian to set aside for fraud a release given by the ward,

[217] Landis v. Hamilton, 77 Mo. 554. On the same principle, see Palmer v. Hayes, 112 Ind. 289, 13 N. E. 882.

[218] Frank v. Wedderin, 16 C. C. A. 1, 68 Fed. 818; Eagle Manuf'g Co. v. David Bradley Manuf'g Co. (C. C.) 50 Fed. 193; Theller v. Hershey (C. C.) 89 Fed. 575; Carey v. Roosevelt (C. C.) 91 Fed. 567; Castle v. Noyes, 14 N. Y. 329; Worley v. Hineman, 6 Ind. App. 240, 33 N. E. 260; Baxter v. Myers, 85 Iowa, 328, 52 N. W. 234, 39 Am. St. Rep. 298; Grant Tp. v. Reno Tp., 107 Mich. 409, 65 N. W. 376; Reed v. McGregor, 62 Minn. 94, 64 N. W. 88; Hurd v. McClellan, 1 Colo. App. 327, 29 Pac. 181; Boyd v. Wallace, 10 N. D. 78, 84 N. W. 760; Shoemake v. Finlayson, 22 Wash. 12, 60 Pac. 50. A corporation which assumes the defense of a patent infringement suit, brought against one who purchased the infringing articles from it, is estopped by the judgment to the same extent as if it had been a party. Empire State Nail Co. v. American Solid Leather Button Co. (C. C.) 71 Fed. 588. So where, on a libel in rem for collision, the master of the libelee, though not a formal party, takes an active part in the defense, a dismissal on the merits renders the question res judicata, as against a subsequent libel in personam against him. Bailey v. Sundberg, 1 U. S. App. 101, 1 C. C. A. 387, 49 Fed. 583.

[219] Tyrrell v. Baldwin, 67 Cal. 1, 6 Pac. 867.

[220] Estelle v. Peacock, 48 Mich. 469, 12 N. W. 659. And see Wood v. Ensel, 63 Mo. 193.

the sureties on the guardian's bond employ counsel to defend, and counsel appear in the case and examine witnesses, the sureties paying costs and disbursements in the suit, they cannot afterwards assert that they are not bound by the decree because they were not made defendants of record.[221] But in order that this result may be brought about, it is necessary that three conditions be fulfilled. In the first place, the person so intervening in the suit must come in for the assertion or protection of some claim or interest of his own. He must not be a mere intermeddler. This interest may either be an interest in the subject-matter of the particular litigation,[222] or it may consist in a responsibility over to the defendant, which will attach if judgment goes against him, and resting either on some covenant or an implied obligation to indemnify him. Secondly, he must have defended the action avowedly and with notice to the opposite party, and not upon a secret understanding.[223] And thirdly, his interposition must have been so complete that he was practically substituted for the defendant in the management and control of the case. That he employed the attorney who appeared for the defendant of record; that he himself testified as a witness; that he was present and aided in the conduct of the trial; that he cross-examined the witnesses; that he lent assistance in money or services to the defendant; that he joins in taking an appeal;—none of these circumstances alone is sufficient to make him a party to the judgment.[224]

[221] Parr v. State, 71 Md. 220, 17 Atl. 1020.

[222] The case of persons having similar interests and uniting in the prosecution or defense of a test case does not really come within this rule, because they are estopped, not so much by the judgment in the test case, as by their agreement to abide by its result.

[223] Andrews v. National Foundry & Pipe Works, 22 C. C. A. 110, 76 Fed. 166, 36 L. R. A. 139; Cramer v. Singer Manuf'g Co., 35 C. C. A. 508, 93 Fed. 636; Lane v. Welds, 39 C. C. A. 528, 99 Fed. 286.

[224] Lacroix v. Lyons (C. C.) 33 Fed. 437; Schroeder v. Lahrman, 26 Minn. 87, 1 N. W. 801; Cannon River Mfrs.' Ass'n v. Rogers, 42 Minn. 123, 43 N. W. 792, 18 Am. St. Rep. 497; Central Baptist Church & Society v. Manchester, 17 R. I. 492, 23 Atl. 30, 33 Am. St. Rep. 893; Brady v. Brady, 71 Ga. 71; Turpin v. Thomas' Representatives, 2 Hen. & M. (Va.) 139, 3 Am. Dec. 615; Majors v. Cowell, 51 Cal. 478; Allin's Heirs v. Hall's Heirs, 1 A. K. Marsh. (Ky.) 525; Koehring v. Aultman, Miller & Co. (Ind. App.) 35 N. E. 30; Goodnow v. Stryker, 62 Iowa, 221, 14 N. W. 345; Williams v. Cooper, 134 Cal. 666, 57 Pac. 577; State v. Johnson, 123 Mo. 43, 27 S. W. 399.

Where, in a suit between two parties, other persons interested in the decision of the question in favor of one of the parties, on account of its effect upon their property, contribute to the employment of his counsel, such persons do not thereby become parties to the suit, and are not bound by the judgment.[225]

§ 541. Person Submitting his Interest is Bound.

Numerous cases show that a judgment may be binding as an estoppel upon a person who, although not nominally or formally a party to the action in which it was rendered, submitted his interest in the subject-matter of the litigation to the consideration of the court and invited its adjudication thereon.[226] So where the court allows any person to appear and be heard upon the argument of a motion, in the decision of which he is interested, such hearing is as effectual as though such person had received notice of the motion and had been named as a formal party to it, and he is fully concluded by the disposition which the court may make of such motion.[227] And so, an adjudication which settles a disputed boundary line of lands is binding, not only upon parties of record, but also upon one who was interested in the defense of the action, and who in fact conducted the defense, though in the name of another.[228] And of course all persons who are brought into the suit, as additional parties, on account of interests claimed by them in the subject of the litigation, either by original process or by order of court on motion of the

[225] Lownsdale v. City of Portland, 1 Or. 381, Deady, 1, Fed. Cas. No. 8,578.

[226] Sevey v. Chick, 13 Me. 141; Conant v. Jones, 50 App. Div. 336, 64 N. Y. Supp. 189; Van Koughnet v. Dennie, 68 Hun, 179, 22 N. Y. Supp. 823; Parker v. Moore, 59 N. H. 454; Albert v. Hamilton, 76 Md. 304, 25 Atl. 341; Hidell v. Funkhouser, 89 Ga. 532, 16 S. E. 79; Reinach v. New Orleans Imp. Co., 50 La. Ann. 497, 23 South. 455; Goss v. Singleton, 2 Head (Tenn.) 67; Bomar v. Ft. Worth Bldg. Ass'n, 20 Tex. Civ. App. 603, 49 S. W. 914; Sandoval v. Rosser, 86 Tex. 682, 26 S. W. 933; Converse v. Davis (Tex. Civ. App.) 37 S. W. 247; Hawkins v. Taylor, 128 Ind. 431, 27 N. E. 1117; Lancaster v. Snow, 184 Ill. 534, 56 N. E. 813; St. Paul Nat. Bank v. Cannon, 46 Minn. 95, 48 N. W. 526, 24 Am. St. Rep. 189; Johnston v. San Francisco Sav. Union, 75 Cal. 134, 16 Pac. 753, 7 Am. St. Rep. 129. Compare Gulf City Trust Co. v. Hartley, 20 Tex. Civ. App. 180, 49 S. W. 902.

[227] Jay v. De Groot, 2 Hun (N. Y.) 205.

[228] McNamee v. Moreland, 26 Iowa, 96.

original parties, or by interpleader or cross-petition, will be as conclusively bound by the result of the litigation as if they had been parties from the inception of the suit.[229] But an assignee of third persons who is admitted to appear and defend, on the supposition that the interests of his assignors might in some way be affected by the action, and who afterwards withdraws his appearance by leave of court, is not to be considered a party to the action, nor privy to the judgment, nor bound by it.[230] And in general, a judgment is not an estoppel for or against persons who, though interested in the subject-matter of the litigation, are not parties to the case; and this rule is not affected by the fact that such persons may have been present at the trial or hearing, and may have assisted to some extent in the prosecution or defense of the action.[231]

[229] Riley v. First Nat. Bank, 81 Md. 14, 31 Atl. 585; Desnoyers v. Denuison, 19 Ohio Cir. Ct. R. 320; Breault v. Merrill & Ring Lumber Co., 72 Minn. 143, 75 N. W. 122; Gardner v. Stratton's Adm'r, 89 Va. 900, 17 S. E. 553; Brown v. Walker, 108 N. C. 387, 13 S. E. 8; Swope v. Schwartz (Ky.) 15 S. W. 251; Satterwhite v. Sherley, 127 Ind. 59, 25 N. E. 1100; Isbell v. Stewart, 125 Ind. 112, 25 N. E. 160. Where a nonresident of the state, in compliance with an order of court, requiring him to interplead in an action, appears and pleads to the merits, he is concluded by the court's judgment. German Bank v. American Fire Ins. Co., 83 Iowa, 491, 50 N. W. 53, 32 Am. St. Rep. 316. So, where an adverse claimant was cited to show cause why certain judgments should not be enforced against land in dispute, he cannot afterwards be permitted to say that the judgment of the court ordering the sale of the land for such purpose was not a bar to his title. Bruce v. Osgood, 154 Ind. 375, 56 N. E. 25. See Scott v. Wagner, 2 Kan. App. 386, 42 Pac. 741. But where persons who were not parties to the action in the lower court were named as appellees on an appeal, they did not thereby become parties, so as to entitle them, in a subsequent action between them and the appellant, to plead in bar the judgment which was affirmed on that appeal. Owingsville & Mt. S. Turnpike Road Co. v. Hamilton (Ky.) 54 S. W. 175.

[230] Swamscot Machine Co. v. Walker, 22 N. H. 457, 55 Am. Dec. 172. And see Woods v. White, 97 Pa. 222; Sergeant's Ex'rs v. Ewing, 30 Pa. 75.

[231] Turner v. Cates, 90 Ga. 731, 16 S. E. 971; Williamson v. White, 101 Ga. 276, 28 S. E. 846, 65 Am. St. Rep. 302; Koehring v. Aultman, Miller & Co., 7 Ind. App. 475, 34 N. E. 30; Fifth Mut. Bldg. Soc. v. Holt, 184 Pa. 572, 39 Atl. 293; Myers v. McGavock, 39 Neb. 843, 58 N. W. 522, 42 Am. St. Rep. 627; State v. Anderson, 26 Fla. 240, 8 South. 1; Leftwich Lumber Co. v. Florence Mut. Building, Loan & Savings Ass'n, 104 Ala. 584, 18 South. 48. See Northern Bank of Kentucky v. Stone (C. C.) 88 Fed. 413.

§ 542. Witnesses.

The fact that one appeared merely as a witness in the former proceeding does not make him privy to the judgment rendered therein, so that he will be bound by it in a subsequent suit between the witness and one of the parties to the prior action.[232]

§ 543. Effect of Additional Parties.

It is not always a conclusive objection to the admissibility of a record as an estoppel or as a bar that the parties to the former action included some who are not joined in the second action, or vice versa.[233] "The fact that parties in the first suit are not identically the same as those in the second, when the first case was decided on the merits, and not upon an exception to joinder or non-joinder of parties, is certainly no answer to the plea [of former recovery], otherwise, no matter how often a case be decided, the parties might renew the litigation by simply joining with them a new party." [234] "The objection that the first action was between other parties is not well grounded, and has no basis in fact to rest it upon the principle of res inter alios acta. That principle applies where the party against whom the record is offered was not himself a party to it. In such case, the general rule is that the record is not admissible. But here

[232] Yorks v. Steele, 50 Barb. (N. Y.) 397; In re Miller's Estate, 159 Pa. 562, 28 Atl. 441; Wright v. Andrews, 130 Mass. 149; Blackwood v. Brown, 32 Mich. 104; Goodin v. Newcomb, 6 Kan. App. 431, 49 Pac. 821; Schroeder v. Lahrman, 26 Minn. 87, 1 N. W. 801.

[233] Thompson v. Roberts, 24 How. 233, 16 L. Ed. 648; Lawrence v. Hunt, 10 Wend. (N. Y.) 80, 25 Am. Dec. 539; Dows v. McMichael, 6 Paige (N. Y.) 139; Tauziede v. Jumel, 133 N. Y. 614, 30 N. E. 1000; Palmer v. Great Western Ins. Co., 10 Misc. Rep. 167, 30 N. Y. Supp. 1044; Fowler v. Osborne, 111 N. C. 404, 16 S. E. 470; Hawkins v. Lambert, 18 B. Mon. (Ky.) 99; Peterson v. Warner, 6 Kan. App. 298, 50 Pac. 1091; Davenport v. Barnett, 51 Ind. 329; Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608; Nave v. Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; Parker v. Straat, 39 Mo. App. 616; Glasner v. Weisberg, 43 Mo. App. 214; Whitcomb v. Hardy, 68 Minn. 265, 71 N. W. 263; Delano v. Jacoby, 96 Cal. 275, 31 Pac. 290, 31 Am. St. Rep. 201; Neppach v. Jones, 28 Or. 286, 42 Pac. 519; Leggett v. Ross, 14 Wash. 41, 44 Pac. 111.

[234] Girardin v. Dean, 49 Tex. 243.

this defendant was a party to that record, and the objection in fact is that other persons were also parties thereto. As we understand the rule, that single fact alone constitutes no valid objection to the admission of the record."[235] For example, if, in an action brought against one of two joint promisors, the non-joinder of the other promisor is not pleaded in abatement, but the case is tried on the merits and judgment is rendered against the plaintiff, and another action for the same cause is brought by the same plaintiff against the two promisors, the parties in the two actions are, within the rule of law, the same.[236] This rule is of course subject to certain necessary limitations, depending upon the character in which the parties sue and the nature of the matter in litigation. Thus, where one of two joint owners of a chattel brings an action against a third person for an injury to the chattel, and judgment goes against him, this will bar a subsequent action by the two owners, suing jointly, against the same person for the same injury; because, since the owner who first sued was barred by the judgment against him, his being united with the other in the second action was a fatal misjoinder; but the original suit would not operate to bar an action by the joint owner who was not included therein as plaintiff, against the same defendant, for his aliquot share of the damages arising out of the alleged injury, because he was not a party to that action.[237] But it has been held by the supreme court of the United States that where a former judgment is conclusive upon one of several plaintiffs, but not upon the others, in consequence of their not having been parties to the action in which it was rendered, it is not error to exclude it when offered in evidence by the defendant as an estoppel, at least, if the circumstances of the case are such that one or more of the plaintiffs may be entitled to recover though the others be debarred.[238] But generally speaking, a party to a pending action, who was not a party to a former one, and therefore not bound by the adjudication therein, is not entitled to plead such adjudication as an estoppel against a party

[235] Larum v. Wilmer, 35 Iowa, 244.

[236] French v. Neal, 24 Pick. (Mass.) 55.

[237] Brizendine v. Frankfort Bridge Co., 2 B. Mon. (Ky.) 32, 36 Am. Dec. 587. And see Fell v. Bennett, 110 Pa. 181, 5 Atl. 17.

[238] Blackburn v. Crawford, 3 Wall. 175, 18 L. Ed. 186.

who was a party to the former action.[239] This is on the principle that estoppels must be mutual. And the estoppel arising from a judgment or decree does not apply in a subsequent suit where a new plaintiff comes in, seeking to litigate matters not determined in the former suit, though otherwise the parties are the same.[240]

§ 544. Effect of Severance as to Parties.

In an action against several defendants, if the case is discontinued or dismissed as to one of them, he is not bound by the judgment rendered therein.[241] So where one of two defendants in an action in a state court removes so much of the controversy therein as lies between the plaintiff and himself into the federal court, under the act of congress in that behalf, he will not be bound by any adjudication made against his co-defendant in the state court after the removal was effected.[242] In a recent case it appeared that, the action being against four defendants, judgment was rendered in favor of one of them and against the others, under a statute authorizing that practice. The latter moved for a new trial, and the motion, though overruled below, was sustained on appeal on the ground of insufficient evidence. The action was subsequently dismissed in the trial court, but was re-commenced in the federal court against all four defendants on the same cause of action. It was held that the former judgment, so far as it related to the defendant in whose favor it was rendered, not having been appealed from, was a bar to the action against him in the federal court.[243] Again, where the issue submitted, upon a cause transferred to the chancery court, was as to whether a defendant had an interest in the property in controversy as his father's partner, and there was another party in the cause, claiming title to the property, who was not a party to this issue, and the decree found that all the property belonged to the father, it was held that, as to the one not a party to the issue, the decree was not binding.[244] By a com-

[239] Whitcomb v. Hardy, 68 Minn. 265, 71 N. W. 263; Kelly v. Hamblen, 98 Va. 383, 36 S. E. 491.

[240] Cleveland v. Spencer, 19 C. C. A. 559, 73 Fed. 559.

[241] Berber v. Kerzinger, 23 Ill. 346; Browner v. Davis, 15 Cal. 9.

[242] Missouri v. Teidermann (C. C.) 10 Fed. 20.

[243] Bloch v. Price (C. C.) 32 Fed. 447.

[244] McReynolds v. McReynolds, 74 Iowa, 89, 36 N. W. 903.

bination of this principle with the principle that estoppels must be mutual, we deduce the rule that a defendant joined in an action with other defendants, and who has procured a separate trial of the issues between himself and the plaintiff, cannot claim that a trial between the plaintiff and another defendant is an adjudication as to him.[245]

§ 545. One Plaintiff suing in Behalf of Many.

Under certain circumstances, persons who were not parties of record may be bound by the judgment, on the ground of their having been represented by one or more other plaintiffs holding similar and homogeneous interests. Thus in an action to foreclose a corporation mortgage, where the lienholders are so numerous that it is impracticable to bring them all before the court, and some of them are allowed to prosecute for the benefit of all, and a special master is appointed with instructions to report the names of the lienholders and the amount due each, those who appear before the master and prove their claims are as much bound by a judgment or order affecting the subject-matter of the suit as if they had formally been made parties.[246] But in order that this may result, it appears to be necessary that such interested persons should accept the representation and connect themselves with the litigation, either by coming into the suit or by seeking to share in the fruits of the judgment. It is in their option to make it available to themselves, but it is not available against them unless they so act with reference to it.[247] A judgment

[245] Eikenberry v. Edwards, 71 Iowa, 82, 32 N. W. 183; Thompson v. Chicago, St. P. & K. C. Ry. Co., 71 Minn. 89, 73 N. W. 707.

[246] Carpenter v. Canal Co., 35 Ohio St. 307; Hurlbutt v. Butenop, 27 Cal. 50; Kerr v. Blodgett, 48 N. Y. 66. But an action brought by an individual bondholder to enforce a lien on railroad equipment bonds, in which no relief is sought or obtained in behalf of other bondholders, and in which they were not permitted to become parties, is not a bar to a subsequent action by other holders of such equipment bonds to enforce their liens. Adelbert College v. Toledo, W. & W. Ry. Co., 3 Ohio N. P. 15.

[247] O'Brien v. Browning, 49 How. Prac. (N. Y.) 109; Brower v. Bowers, 1 Abb. Dec. (N. Y.) 214. A judgment in an action to set aside a general assignment as in fraud of creditors is not conclusive in a subsequent action by another creditor, suing in behalf of himself and all creditors similarly situated, to set aside the assignment. McNaney v. Hall, 159 N. Y. 544, 54 N. E. 1093; Heywood v. Thacher, 65 Hun, 619, 19 N. Y. Supp. 882. Compare Stallcup v. City of Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25.

in a suit brought by one of a class for the benefit of all members of the class who come in and contribute to the expenses of the suit is not binding on one who does not come in or contribute.[248] Where there is a fund in court to be distributed among different claimants, a decree of distribution will not preclude a claimant not embraced in its provisions, but having rights similar to those of other claimants who are thus embraced, from asserting by bill or petition his right to share in the fund.[249]

§ 546. Unknown Owners.

A person designated in the proceedings as an "unknown owner" will also be concluded by the judgment in a proper case. Thus, where a statute authorizes proceedings in partition to be taken against "unknown owners" as well as those specifically made parties, and provides that the judgment rendered shall be binding and conclusive (1) on all parties named therein, (2) on all persons interested in the premises who may be unknown, to whom notice shall have been given by personal service or by publication as therein directed, and (3) on all persons claiming from such parties or any of them; it is held that upon a complaint for partition against certain named parties and others as "unknown owners," and publication of notice as directed by the statute, a person in possession, claiming to hold a part of the land in severalty, and by a title paramount to that of the parties actually named in the proceedings, and who was not named as a party and had no actual notice of the commencement or pendency of the proceedings, is concluded by the judgment as an "unknown owner," in the absence of evidence that there was any fraud or collusion in the institution of the action or procuring the judgment, and his title is bound thereby.[250]

[248] Compton v. Jesup, 15 C. C. A. 397, 68 Fed. 263. As to judgments in test cases, see Bank of Commerce v. City of Louisville (C. C.) 88 Fed. 398.

[249] Ex parte Howard, 9 Wall. 175, 19 L. Ed. 634; Williams v. Gibbs, 17 How. 239, 15 L. Ed. 135. See Hansen's Empire Fur Factory v. Teabout, 104 Iowa, 260, 73 N. W. 875.

[250] Nash v. Church, 10 Wis. 303, 78 Am. Dec. 678; Cook v. Allen, 2 Mass. 462. And see Burlingham v. Vandevender, 47 W. Va. 804, 35 S. E. 835. Compare Skinner v. Franklin County, 6 C. C. A. 118, 56 Fed. 783.

§ 547. Evidence to Identify Parties.

When a former judgment is received in evidence, the identity of the names in the judgment with those in the pending action is prima facie sufficient to establish the identity of the persons. If, however, there appears to be a discrepancy, parol testimony is admissible to show the identity of the parties named in the record with those named in the pending action.[251] Where, in ejectment, the record of a former action by the same plaintiff, involving the title to the same land, is read in evidence, it is for the court to determine whether the complaint therein charged one named as defendant in that action with having an interest in the land, and whether the judgment was conclusive upon such defendant, and this being affirmatively decided, it is for the jury to determine, upon other evidence appropriate to that point, whether the present defendant is the same person who was named and served as defendant in that suit.[252] Parol evidence is also admissible to show that a third person, though not appearing on the record as a party to the former action, was in fact the real party in interest, had the sole management of the case, put his title in issue, and is therefore bound by the judgment.[253]

§ 548. Estoppel must be Mutual.

In the application of the rule of res judicata, it is essential that its operation be mutual. Therefore a party will not be concluded, against his contention, by a former judgment, unless he could have used it as a protection, or as the foundation of a claim, had the judgment been the other way; and conversely, no person can claim the benefit of a judgment, as an estoppel upon his adversary, unless he would have been prejudiced by a contrary decision of the case.[254]

[251] Garwood v. Garwood, 29 Cal. 514; Greely v. Smith, 3 Woodb. & M. 236, Fed. Cas. No. 5,750; Bailey v. Crittenden (Tex.) 44 S. W. 404.

[252] Warner v. Mullane, 23 Wis. 450.

[253] Tarleton v. Johnson, 25 Ala. 300, 60 Am. Dec. 515.

[254] Wenman v. Mackenzie, 5 El. & Bl. 447; Wood v. Davis, 7 Cranch, 271, 3 L. Ed. 339; Wright v. Stanard, 2 Brock. 311, Fed. Cas. No. 18,094; Biddle & Smart Co. v. Burnham, 91 Me. 578, 40 Atl. 669; Parker v. Moore, 59 N. H. 454; Van Camp v. Fowler, 133 N. Y. 600, 30 N. E. 1147; Hardy v. Eagle, 25

Thus, where the plaintiff is not a party to the record offered in evidence, not being concluded by it himself, he cannot rely upon it as a technical estoppel upon a garnishee.[255] In a case in New York, it appeared that, after an assessment had been laid by the authorities of a city for the expense of grading a street, certain persons who were assessed brought suit against the city to vacate the assessment, and recovered a judgment declaring the assessment null and void. Afterwards, the present plaintiff, not a party to that suit, brought his action to vacate the assessment as to his property, alleging the same grounds against its validity as had been successfully urged in the prior controversy. But it was held that he was not entitled to the benefit of that judgment as res judicata, the decision proceeding upon the basis of the rule above stated.[256] There are a few cases, however, in which this just and reasonable doctrine seems to have been disregarded. Thus in a Louisiana decision, it was held (according to the syllabus of the case) that where the plaintiff in a suit formally avers that the defendant had collected certain warrants, the property of the plaintiff, and prays the defendant's condemnation for the amount of the warrants, he thereby estops himself from subsequently suing another person as the collector of the warrants.[257]

Misc. Rep. 471, 54 N. Y. Supp. 1045; Southgate v. Montgomery, 1 Paige (N. Y.) 41; Deck v. Johnson, 30 Barb. (N. Y.) 283; Todd v. Kerr, 42 Barb. (N. Y.) 317; Coney v. Harney, 53 N. J. Law, 53, 20 Atl. 736; Groshon v. Thomas, 20 Md. 234; Payne v. Coles, 1 Munf. (Va.) 373; Buford v. Adair, 43 W. Va. 211, 27 S. E. 260, 64 Am. St. Rep. 854; Redmond v. Coffin, 17 N. C. 443; Bradley v. Johnson, 49 Ga. 412; Phillips v. Thompson, 3 Stew. & P. (Ala.) 369; Gwynn v. Hamilton's Adm'r, 29 Ala. 233; Louisville & N. R. Co. v. Brinckerhoff, 119 Ala. 606, 24 South. 892; Harris v. Plant, 31 Ala. 639; Bridges v. McAlister (Ky.) 51 S. W. 603, 45 L. R. A. 800; Simpson v. Jones, 2 Sneed (Tenn.) 36; Bell v. Wilson, 52 Ark. 171, 12 S. W. 328, 5 L. R. A. 370; Lamar Ins. Co. v. Pennell, 19 Ill. App. 212; Woodward v. Jackson, 85 Iowa, 432, 52 N. W. 358; Goodnow v. Litchfield, 63 Iowa, 275, 19 N. W. 226; Nowack v. Knight, 44 Minn. 241, 46 N. W. 348; Densmore v. Tomer, 14 Neb. 392, 15 N. W. 734; Valentine v. Mahoney, 37 Cal. 389.

[255] Groshon v. Thomas, 20 Md. 234; Harris v. Plant, 31 Ala. 639.

[256] Moore v. City of Albany, 98 N. Y. 396.

[257] Board of School Directors v. Hernandez, 31 La. Ann. 158. This decision seems to be clearly wrong, as the estoppel certainly would not be mutual. The case does not explain itself. Bigelow says (Estoppel [3d Ed.] p. 59) that it is "difficult to understand" and "seems to be at variance with the fundamental principle." Herman (Estoppel, p. 944) puts it on the ground of an estoppel by pleading.

§ 549. What Constitutes Privity.

It is well settled that a judgment is conclusive, not only upon those who were actual parties to the litigation, but also upon all persons who are in privity with them.[258] This is not only a doctrine of our own law but also a principle of general jurisprudence, as appears from the rule of the Roman law that "the plea of res judicata is available against him who has succeeded to the rights of ownership of the person who suffered the judgment." [259] It is therefore important to ascertain what constitutes privity within the meaning of the decisions on this subject. Now privity is defined to be a "mutual or successive relationship to the same rights of property." [260] And the common law writers classify privies as privies in law, in blood, or in estate, sometimes adding, as a fourth class, privies in representation. But for the purposes of a discussion of the doctrine of res judicata, this classification is of no practical importance. For we have to do only with privies in estate. And if a person is bound by a judgment, as a privy to one of the parties, it is because he has succeeded to some right, title, or interest of that party in the subject-matter of the litigation, and not because there is privity of blood, law, or representation between them, although privity of the latter sort may also exist.[261]

[258] Beehe v. Elliott, 4 Barb. (N. Y.) 457; Ludington's Petition, 5 Abb. N. C. (N. Y.) 307; Bush v. Knox, 5 Thomp. & C. (N. Y.) 130; Towers v. Tuscarora Academy, 8 Pa. 297; Webster v. Mann, 56 Tex. 119, 42 Am. Rep. 688; Soward v. Coppage (Ky.) 9 S. W. 389; Cole v. Favorite, 69 Ill. 457; Sobey v. Beiler, 28 Iowa, 323; Adams County v. Graves, 75 Iowa, 642, 36 N. W. 889; Stoutimore v. Clark, 70 Mo. 471; Finney v. Boyd, 26 Wis. 366; Grunert v. Spalding (Wis.) 78 N. W. 606; Cunningham v. Harris, 5 Cal. 81.

[259] Dig. 44, 2, 28.

[260] Bouv. Law Dict.; 2 Greenl. Ev. § 189. But one who is in possession of land under an agreement of another to sell it to him, and to convey it to him on payment of the purchase price, is not bound by a decree in an action against his vendor to quiet title, if he was not a party to the suit. Steel v. Long, 104 Iowa, 39, 73 N. W. 470. On the other hand, a plea of res judicata, good against a judgment creditor, is good against a party to whom the judgment has been assigned, and who seeks to enforce it against the pleader. Porter v. Bagby, 50 Kan. 412, 31 Pac. 1058.

[261] Other questions than that of the title to property may be concluded by a judgment so as to be binding on successive owners of the property. Thus, in a suit against a manufacturer of a machine for infringing a patent, a judg-

And in order to create this relationship, two requisites must exist. In the first place, the person who is to be thus connected with the judgment must be one who claims an interest in the subject affected through or under one of the parties.[262] For example, in an action for the conversion of a chattel, alleged to have been stolen from the plaintiff and to have afterwards come into the possession of the defendant, and which the defendant upon demand has refused to deliver to the plaintiff, a judgment in favor of the defendant in a previous action brought by him to recover possession of the property, against a police officer by whom it had been taken under a search-warrant, as the plaintiff's property stolen from him, of which previous action the plaintiff had knowledge, but to which he was not a party, does not constitute a defense, there being no privity between the plaintiff and the officer.[263] This part of the rule has been differently stated in the following terms: Wherever equity would subrogate a second plaintiff to all the rights of the first, the judgment is conclusive of every fact necessarily adjudicated against him who primarily ought to satisfy it.[264] In the second place privies, in such sense that they are bound by the judgment, are those who acquired an interest in the subject-matter after the rendition of the judgment; if their title

ment for defendant, on the merits, on the question of infringement, is conclusive in a suit by the same complainant against a purchaser of the identical machine from such manufacturer. Norton v. San Jose Fruit-Packing Co., 25 C. C. A. 194, 79 Fed. 793. But while the decision in an action becomes a rule of property as to the subject-matter thereof, and passes with it to all persons subsequently claiming under the parties to the action, it does not attach to any other property, the limit of its effect as to privies being the limit of the particular property, right, subject-matter, or thing involved in the litigation. Hart v. Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881.

[262] Calderwood v. Brooks, 28 Cal. 151; Thompson v. Clark, 4 Hun (N. Y.) 164. A claimant of land under the homestead donation laws is not concluded by judgments against prior claimants, holding the land to be owned by a private person under a former grant, the state, through whom such settler claims, not being bound by the judgment. Coleman v. Davis (Tex.) 36 S. W. 103. And see Miller v. Wills, 95 Va. 337, 28 S. E. 337. Where one claiming under a tax sale is not made a party to proceedings to foreclose a mortgage made previous to the levy of the taxes for which the sale was made, he is not affected by a decree foreclosing the mortgage, or by a sale and conveyance thereunder. Chard v. Holt, 136 N. Y. 30, 32 N. E. 740.

[263] Scott v. Drennen, 9 Daly, 226.

[264] Lloyd v. Barr, 11 Pa. 41.

or interest attached before that fact, they are not bound unless made parties.[265] Thus a tenant of the defendant in ejectment, who acquired his lease before the commencement of the suit, is not estopped as to his term by a judgment in the action obtained against his lessor.[266]

Taking the rule to be, therefore, that every person is a privy to a judgment whose succession to the rights of property thereby affected, coming through one or other of the parties, occurred subsequent to the commencement of the suit, we may proceed to illustrate it by some of its more familiar applications. For instance, a judgment rendered against the grantor in a conveyance of realty, as defendant in an action involving the title thereto, will be conclusive upon his grantee taking after the suit.[267] So, questions determined by a court of competent jurisdiction in a suit against the assignor of a lease, for rent accruing subsequent to the assignment, cannot be reconsidered in a suit by the assignor against the assignee for the repayment of such rent.[268] Where, in an action of trover, the defendant justifies the taking by the command of a third person, and under the

[265] Foster v. Derby, 1 Adol. & E. 768; Dull v. Blackman, 169 U. S. 243, 18 Sup. Ct. 333, 42 L. Ed. 733; Cook v. Lasher, 19 C. C. A. 654, 73 Fed. 701; Southern Bank & Trust Co. v. Folsom, 21 C. C. A. 568, 75 Fed. 929; Carroll v. Goldschmidt, 27 C. C. A. 566, 83 Fed. 508; Hunt v. Haven, 52 N. H. 162; Wilson v. Davol, 5 Bosw. (N. Y.) 619; Bennett v. Gray, 92 Hun, 86, 36 N. Y. Supp. 372; Moreland v. H. C. Frick Coke Co., 170 Pa. 33, 32 Atl. 634; Bensimer v. Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774; Hodge v. Hodge, 56 S. C. 263, 34 S. E. 517; Garrard v. Hull, 92 Ga. 787, 20 S. E. 357; Elwell v. New England Mortg. Security Co., 101 Ga. 496, 28 S. E. 833; Patapsco Guano Co. v. Hurst, 106 Ga. 184, 32 S. E. 136; Roulston v. Hall, 66 Ark. 305, 50 S. W. 690, 74 Am. St. Rep. 97; Gregory v. Clabrough's Ex'rs, 129 Cal. 475, 62 Pac. 72. Matters adjudicated against complainant on a supplemental bill filed after he had conveyed the land in controversy, and relating to matters which arose after the filing of the original bill, are not res judicata as to the title of the grantee, if he was not privy to the filing of the supplemental bill, or to the proceedings thereunder. Gage v. Parker, 178 Ill. 455, 53 N. E. 317. Compare Powell v. Heckerman, 6 Tex. Civ. App. 304, 25 S. W. 166.

[266] Satterlee v. Bliss, 36 Cal. 489.

[267] Central Nat. Bank v. Hazard (C. C.) 30 Fed. 484; Collins v. Goldsmith (C. C.) 71 Fed. 580; Eakin v. McCraith, 2 Wash. T. 112, 3 Pac. 838; Cushing v. Edwards, 68 Iowa, 145, 25 N. W. 940; Bell v. Peterson, 105 Wis. 607, 81 N. W. 279; Provident Loan Trust Co. v. Marks, 6 Kan. App. 34, 49 Pac. 625; Riverside Land & Irr. Co. v. Jensen, 108 Cal. 146, 41 Pac. 40.

[268] Ruppel v. Patterson (C. C.) 1 Fed. 220.

title of the latter, he is to be regarded as a privy of such third person, and the record of a former recovery by the plaintiff against such third person, for the taking of the property, is admissible in evidence against the defendant, and is conclusive as to the plaintiff's title and right of possession.[269] Again, where an ejectment suit to try the title to land was determined in favor of the plaintiff, and after its decision the defendant conveyed the property, and his grantee afterwards obtained the possession of the land, in an action of ejectment against the latter's grantee, it was held that he was estopped from denying the plaintiff's title because of the former suit against the grantor.[270] Hence we see that the rule of conclusiveness upon privies applies equally where the person to be bound is two or more steps removed from the record-party who constituted his source of title, provided no new title has accrued in his hands.[271] Tenants who enter under other tenants, on whom notice in ejectment has been served, will be concluded by the judgment.[272]

§ 550. Purchaser Pendente Lite.

It is a general rule that a purchaser of property (except negotiable paper before maturity), who buys pending a litigation concerning it, comes into privity with his vendor, so as to be bound by the judgment in that suit the same as if made a party of record.[273] "We apprehend it is well settled that he who purchases property pending a suit in which the title to it is involved, takes it subject to the judgment or decree that may be passed in such suit against the person from

[269] Calkins v. Allerton, 3 Barb. (N. Y.) 171.

[270] Whitford v. Crooks, 54 Mich. 261, 20 N. W. 45.

[271] A judgment for the recovery of land is as binding on a purchaser from the heirs of the party against whom it was rendered as if he had been himself a party. Ross v. Banta, 140 Ind. 120, 34 N. E. 865.

[272] Smith's Lessee v. Trabue's Heirs, 1 McLean, 87, Fed. Cas. No. 13,116.

[273] Murray v. Ballou, 1 Johns. Ch. 566; Craig v. Ward, 1 Abb. Dec. (N. Y.) 454; Wickliffe v. Bascom, 7 B. Mon. (Ky.) 681; Diamond v. Lawrence Co., 37 Pa. 353, 78 Am. Dec. 429; Hersey v. Turbett, 27 Pa. 418; American Exch. Bank v. Andrews, 12 Heisk. (Tenn.) 306; Haynes v. Calderwood, 23 Cal. 409; Gregory v. Haynes, 13 Cal. 591; Sawyer v. McAdie, 70 Mich. 386, 38 N. W. 292; Snowman v. Harford, 62 Me. 434; Jackson v. Stone, 13 Johns. (N. Y.) 447; Moon's Adm'r v. Crowder, 72 Ala. 79; Jinks v. Lewis, 94 Ga. 677, 20 S. E. 6; Buckner v. Geodeker (Tenn. Ch.) 45 S. W. 448.

whom he purchases. That he purchased bona fide and paid a full consideration for it, will not avail against such judgment or decree. Nor will he be permitted to prove that he had no notice of the suit. The law infers that all persons have notice of the proceedings of courts of record." [274] "The law is that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset." [275] It is on this principle that the purchaser of mortgaged premises, taking title after the institution of a foreclosure suit, is bound by the judgment of foreclosure rendered against the mortgagor, although such purchaser is not made a party to the suit.[276] So one who becomes the purchaser and assignee of a mortgage, pending a suit to set the same aside as void for fraud, thereby comes into the same position as if he were a co-defendant of record; and hence, in subsequent proceedings between such purchaser and any of the actual defendants, the judgment in that suit is conclusive as to the same question of fraud again arising.[277] The plaintiff in the action need not make such purchaser a party, or otherwise notice his purchase. If the latter desires to defend the suit, he must make himself a party to it in some proper manner, as, in equity, by supplemental bill, before it terminates.[278] In a late case it is said that the purpose of the rule is to keep the subject-matter of the litigation within the power of the court until the judgment or decree shall be entered, since otherwise, by successive alienations pending the suit, the judgment or decree could be rendered abortive and impossible of execution. It is also said that two things seem to be indispensable to give effect to the doctrine of lis pendens: (1) That the litigation must be about some specific thing which must neces-

[274] Brightman v. Brightman, 1 R. I. 112.

[275] Tilton v. Cofield, 93 U. S. 163, 23 L. Ed. 858; Inloe v. Harvey, 11 Md. 524; Salisbury v. Morss, 7 Lans. (N. Y.) 359; 1 Story, Eq. Jur. § 406.

[276] Knowles v. Lawton, 18 Ga. 476, 63 Am. Dec. 290; Williams v. Terrell, 54 Ga. 463; Guerin v. Danforth, 45 Ga. 493; Barden v. Grady, 37 Ga. 665; Stokes v. Maxwell, 59 Ga. 78; Malone v. Marriott, 64 Ala. 486; Daniels v. Henderson, 49 Cal. 242; Hoppin v. Avery, 87 Mich. 551, 49 N. W. 887.

[277] Craig v. Ward, 36 Barb. 377. See Wild v. Noblesville Bldg. Loan Fund & Savings Inst., 153 Ind. 5, 53 N. E. 944.

[278] Greenwich Bank v. Loomis, 2 Sandf. Ch. 70. See Drinkhouse v. Spring Valley Water-Works, 87 Cal. 253, 25 Pac. 420.

sarily be affected by the termination of the suit; and (2) that the particular property involved in the suit must be so definite in the description that any one reading it can learn thereby what property is intended to be made the subject of litigation.[279] It is generally held that the commencement of a suit by service of a summons, or by subpœna in equity, is not in itself sufficient to create a lis pendens as against a subsequent purchaser; but in order to produce that effect, there must also be a complaint or bill on file at the time of his purchase in which the claim upon the property is set forth.[280] In many of the states (as also in England) the common law on this subject has been changed by statutes, which provide for the filing of a "notice of lis pendens," in actions concerning real property, without which a purchaser who takes title during the suit is not bound by the judgment. But it is to be observed that the only office of a notice of lis pendens is to give constructive notice to, and to bind by the subsequent proceedings, those who may deal with the defendant in respect to the property involved in the action during its pendency and before final judgment. And no notice is necessary to make the judgment effectual as against parties claiming under the defendant by transfer subsequent to the judgment. The judgment disposes of the rights of the parties, is a matter of public record, and is conclusive both upon the defendant and any subsequent grantee.[281] It is also conclusive, without such notice, upon a purchaser who has actual knowledge of the pendency of the suit.[282]

§ 551. Mortgagor and Mortgagee.

On the general rules of privity in law, it is held that a judgment against a mortgagor of realty, rendered prior to the execution of the mortgage, binds the mortgagee as a privy, and is conclusive as to all defenses which might have been urged against the claim on which it is founded.[283] But a mortgagee is not bound by any

[279] Houston v. Timmerman, 17 Or. 499, 21 Pac. 1037, 4 L. R. A. 716, 11 Am. St. Rep. 848.

[280] Leitch v. Wells, 48 N. Y. 585; Murray v. Ballou, 1 Johns. Ch. 566.

[281] Sheridan v. Andrews, 49 N. Y. 478.

[282] Sampson v. Ohleyer, 22 Cal. 200.

[283] Cook v. Parham, 63 Ala. 456; Schnepf's Appeal, 47 Pa. 87; Wilson v. Tompkins, 24 Misc. Rep. 598, 54 N. Y. Supp. 6.

proceedings against his mortgagor which were not begun until after the execution of the mortgage, unless he was made a party thereto.[284] Thus a mortgagee of street-railroad franchises is not concluded by a decree affecting their validity in a suit to which the mortgagor only was a party.[285] And so, in an action for divorce, a finding that the defendant husband had fraudulently mortgaged his property to a brother to defeat the wife's rights does not affect the title of the mortgagee, who is not a party to the action.[286] Again, in a suit between a mortgagee and an attaching creditor of the mortgagor, a judgment in the attachment suit in favor of the attaching creditor is not admissible in evidence as against the mortgagee, who was not a party thereto.[287] A judgment in an action begun by a mortgagee of land to set aside a tax deed as a cloud upon the title is not binding upon the mortgagor, where he was in no way a party to the action.[288] And a judgment for plaintiff in ejectment, brought by a purchaser of land at foreclosure sale against the mortgagor, does not conclude the latter on a claim of usury in the debt secured.[289] Similarly, a sale of mortgaged premises to the holder of a mechanic's lien thereon, under a decree in his favor against the owner, is not conclusive of the rights as between him and a subsequent mortgagee, unless the latter was made a party to the proceedings.[290]

[284] Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; Campbell v. Hall, 16 N. Y. 575; Damm v. Mason, 102 Mich. 545, 61 N. W. 3; Vincent v. Hansen, 113 Mich. 173, 71 N. W. 488; Hewlett v. Pilcher, 85 Cal. 542, 24 Pac. 781; Provident Loan Trust Co. v. Marks, 59 Kan. 230, 52 Pac. 449, 68 Am. St. Rep. 349. A judgment in replevin against a mortgagor of chattels is not binding on the mortgagee, not being a party thereto, even though he defended the suit as attorney for his mortgagor. Tyres v. Kennedy, 126 Ind. 523, 26 N. E. 394.

[285] Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 334, 76 Fed. 296.

[286] Westphal v. Westphal, 81 Minn. 242, 83 N. W. 988.

[287] Haller v. Parrott, 82 Iowa, 42, 47 N. W. 996. And see Foster v. Andrews, 4 Tex. Civ. App. 429, 23 S. W. 610.

[288] Shattuck v. Bascom, 105 N. Y. 39, 12 N. E. 283. See Williams v. Cooper, 124 Cal. 666, 57 Pac. 577.

[289] Upchurch v. Anderson (Tenn.) 52 S. W. 917.

[290] Gamble v. Voll, 15 Cal. 507. See Wabash, St. L. & P. Ry. Co. v. Central Trust Co. (C. C.) 33 Fed. 238.

§ 552. Sheriff and his Vendee.

For the statement that a sheriff and his vendee are in privity, in respect to the property affected, we find an authority in an early case in Michigan. There it appeared that the plaintiff brought an action against a sheriff for taking certain personal property, which, on final hearing, was determined against the plaintiff. After the sheriff had sold the property, the plaintiff brought his action to recover the same against the purchaser at the sheriff's sale. But it was held that the judgment in the suit against the sheriff was a bar to the action against the purchaser. The court put its decision distinctly on the ground of privity between the sheriff and his vendee, saying: "The interest of the defendant in the property in question is identical with that of the sheriff; he succeeded to all the rights of the sheriff and no more. Those rights, as against the plaintiff, have been forever determined by the judgment in question." [291] There is another view which may be taken of a question such as this, viz., that of regarding the sheriff as a mere conduit for the title, and his vendee as coming into privity with the title of the original owner divested by the sale. Thus, in Pennsylvania, it is held that a purchaser at a tax sale of land is in privity with the title, if any, that is divested by the sale and passes to him; and hence he is bound by concurrent verdicts and judgments in prior actions of ejectment, to which his predecessors in title were parties, as to the location and title of the land in question.[292] There is no such privity between a sheriff and a plaintiff in an attachment as to render a judgment recovered against the sheriff by a keeper of attached property, for services as such keeper, a bar in favor of the plaintiff in the writ, when sued on a contract to pay for another part of the same services.[293]

[291] Prentiss v. Holbrook, 2 Mich. 372.

[292] Strayer v. Johnson, 110 Pa. 21, 1 Atl. 222. This decision, so far as it concerns a tax sale, would not be universally accepted; because, in many of the states, a tax sale cuts off all previous titles and interests and inaugurates a wholly new, original and independent title. Black, Tax Titles (2d Ed.) § 420.

[293] Hawley v. Dawson, 16 Or. 344, 18 Pac. 592.

§ 553. Co-Tenants.

In general, a judgment rendered against one of two joint owners or tenants in common is not an estoppel upon the other, nor does it conclude him from urging or contesting the same grounds in an action against himself.[294] And this upon the very obvious ground that such co-owners do not claim through or under each other. Thus, if ejectment is brought by a stranger against one of two persons in joint possession, the one not made defendant cannot be expelled under a writ of possession issued upon a judgment in the action, even though the declaration, judgment, and writ embrace the whole of the premises and treat the defendant as sole occupant.[295] And conversely, a judgment in favor of a co-tenant for all the land claimed by the several tenants in common does not estop the defendant, in a future action against him by the one not a party before, from contesting the latter's title. Such a judgment may indeed inure to the benefit of all the tenants in common, so far as the right to possession is concerned, when the declaration discloses their several interests; but in such subsequent action, it can have no effect, except in so far as the assertion of title in the former suit by the co-tenant may have interrupted the running of the statute of limitations.[296] But the record of a suit in which damages for a nuisance were recovered by one of two tenants in common is admissible in evidence, in a subsequent suit, for the same cause, by both tenants, for the time covered by the continuando, and is conclusive that the nuisance existed at that time, when the declaration includes the time covered by the former adjudication but plaintiffs state that they claim no damages prior to the former suit.[297] And a judgment in ejectment in favor of a tenant in common against his

[294] Bass v. Sevier, 58 Tex. 567; Walker v. Perryman, 23 Ga. 314; Stokes v. Morrow, 54 Ga. 597; Miller v. Blackett (D. C.) 47 Fed. 547; Preston v. Fitch, 64 Hun, 636, 19 N. Y. Supp. 849; New York Cent. & H. R. R. Co. v. Brennan, 12 App. Div. 103, 42 N. Y. Supp. 529; Levy v. Winter, 43 La. Ann. 1049, 10 South. 198. Compare Hanson v. Armstrong, 22 Ill. 442.

[295] Stokes v. Morrow, 54 Ga. 597.

[296] Walker v. Read, 59 Tex. 187; Read v. Allen, 56 Tex. 182; Williams v. Sutton, 43 Cal. 65; Johnson v. Foster (Tex. Civ. App.) 34 S. W. 821.

[297] Fell v. Bennett, 110 Pa. 181, 5 Atl. 17.

co-tenant, claiming adversely, is conclusive on the parties and their privies in a subsequent suit for partition.[298]

§ 554. Remaindermen.

According to the commonly accepted doctrine, "if several estates in remainder be limited in a deed, and one of the remaindermen obtain a verdict for him, on an action brought against him for the same land, that verdict may be given in evidence for the subsequent remainderman, in an action brought against him for the same land, though he does not claim any estate under the first remainderman, because they all claim under the same deed."[299] The reason for the general rule holding all the remaindermen in privity, and mutually bound by a judgment against one of their number, is not far to seek. For if the rule were not so, the deed or will of a grantor or testator might so limit the title passed as to leave the holder of an outstanding and paramount title without remedy, because of his not being able, until after the happening of some remote event, to ascertain the persons against whom to institute his action.[300] Accordingly "it is well settled that it is not necessary that remaindermen after the first estate of inheritance should be made parties; and where real estate is in controversy which is subject to an entail, it is sufficient to make the first tenant in tail in esse in whom an estate of inheritance is vested a party, with those claiming prior interests, without making those parties who may claim in remainder or reversion after such estate of inheritance. And a decree against such tenant in tail will bind those in reversion or remainder, although, by the failure of all the previous estates, the estates in remainder or reversion might afterwards become vacated."[301] It is indeed a general rule that estates limited over to persons not in esse are represented by the living owner of the first estate of in-

[298] Estes v. Nell, 140 Mo. 639, 41 S. W. 940.

[299] Pyke v. Crouch, 1 Ld. Raym. 730; Rushworth v. Pembroke, Hardr. 472; Teynham v. Tyler, 6 Bing. 390; Mead v. Mitchell, 17 N. Y. 210, 72 Am. Dec. 455; Goebel v. Iffla, 111 N. Y. 170, 18 N. E. 649; Johnson v. Jacob, 11 Bush (Ky.) 646. Compare Bedon v. Davie, 144 U. S. 142, 12 Sup. Ct. 665, 36 L. Ed. 380.

[300] Johnson v. Jacob, 11 Bush (Ky.) 659.

[301] Baylor's Lessee v. Dejarnette, 13 Grat. (Va.) 152.

heritance; and hence a decree in a suit to which the first remainderman, a living person, is made a party will conclude the rights of after-born remaindermen.[302] But a decree for or against a life-tenant is not conclusive on a remainderman, not made a party to the action, at least where their interests in the subject of the litigation are antagonistic.[303] In some states it is also held that there is no privity in estate between a tenant in dower and the reversioner; and the latter cannot be affected by a verdict for or against the tenant for life unless he comes in upon aid prayer.[304] So also, a tenant by the curtesy is not such a representative of the tenant in fee, or in such privity of estate with him, that a judgment or decree affecting the title of the former will conclusively bind the estate of the latter.[305]

§ 555. Parties to Negotiable Paper.

There is in general no such privity between the makers, indorsers, acceptor, and holder of a bill or note that a judgment in one action upon the instrument will bar another, or furnish an estoppel against a particular allegation or defense in the subsequent suit.[306]

[302] Gray v. Smith (C. C.) 76 Fed. 525; Kent v. Church of St. Michael, 136 N. Y. 10, 32 N. E. 704, 18 L. R. A. 331, 32 Am. St. Rep. 693; Kirk v. Kirk, 137 N. Y. 510, 33 N. E. 552; Dunham v. Deremus, 55 N. J. Eq. 511, 37 Atl. 62; Harrison v. Wallton's Ex'r, 95 Va. 721, 30 S. E. 372, 41 L. R. A. 703, 64 Am. St. Rep. 830; Gavin v. Curtin, 171 Ill. 640, 49 N. E. 523, 40 L. R. A. 776. Compare In re De Leon's Estate, 102 Cal. 537, 36 Pac. 864.

[303] Hull v. Chaffin, 4 C. C. A. 414, 54 Fed. 437; Allen v. De Groodt, 98 Mo. 159, 11 S. W. 240, 14 Am. St. Rep. 626; Caldwell v. Jacob (Ky.) 22 S. W. 436; Nevitt v. Woodburn, 82 Ill. App. 649. But a judgment in favor of a remainder-man, as to his right to property as against the representative of the life-tenant, is conclusive on persons claiming under such representative. Simms v. Freiherr, 100 Ga. 607, 28 S. E. 288.

[304] Adams v. Butts, 9 Conn. 79. But see, per contra, Willey v. Laraway, 64 Vt. 559, 25 Atl. 436.

[305] Hubbell v. Hubbell, 22 Ohio St. 208; Lineberger v. Newkirk, 179 Pa. 117, 36 Atl. 193.

[306] Morris v. Lucas, 8 Blackf. (Ind.) 9; Levi v. McCraney, Morris (Iowa) 91; Jordan v. Ford, 7 Ark. 416; Fenn v. Dugdale, 31 Mo. 580; Barker v. Cassidy, 16 Barb. (N. Y.) 177; Wells v. Coyle, 20 La. Ann. 396; Carter, Rice & Co. v. Howard, 17 Misc. Rep. 381, 39 N. Y. Supp. 1060. Compare Illinois Conference of Evangelical Ass'n v. Plagge, 177 Ill. 431, 53 N. E. 76, 69 Am. St. Rep. 252; Cressey v. Kimmel, 78 Ill. App. 27.

It is familiar law that the holder of such paper may pursue his remedies by successive actions against any or all of the persons severally liable to make payment, until he obtains satisfaction. But, on the other hand, he must in each instance prove his case and not rely on a previous judgment. That is, a judgment in a suit on a note, against one party, cannot be read by the plaintiff as evidence in another action on the same note against another defendant who was not a party to the first suit.[307] But a judgment on a bill lost after its maturity is a complete bar to another action brought by any person receiving the same after maturity; because a holder receiving it after that time would take it subject to the defense of payment to the former holder.[308] And it is also held that a judgment for the defendant, on a plea of want of consideration, in an action by the indorsee of a promissory note against the maker, is a bar to a subsequent action, in another state, by the payee against the maker.[309]

§ 556. Husband and Wife.

There is no privity, in the sense in which we now use the term, between a man and his wife; so that a judgment for or against the one will not be conclusive on the other, unless, in respect to the subject of the action, they claim through or under each other.[310] Thus, a judgment recovered in an action by the wife alone for personal injuries to her is not conclusive on the question of the defendant's liability, in an action by the husband for damages to him by reason of the same injuries.[311] On similar principles, in a statutory action by

[307] Crabb v. Larkin, 9 Bush (Ky.) 154.

[308] Elliott v. Woodward, 18 Ind. 183.

[309] Leslie v. Bonte, 130 Ill. 498, 22 N. E. 594, 6 L. R. A. 62.

[310] See Michan v. Wyatt, 21 Ala. 813; Franklin Sav. Bank v. Taylor, 131 Ill. 376, 23 N. E. 397; Black v. Black (Ky.) 51 S. W. 456; Greer v. Simrall, 22 Ky. Law Rep. 1037, 59 S. W. 759; Owen v. New York & T. Land Co., 11 Tex. Civ. App. 284, 32 S. W. 189; Seay v. Fennell, 15 Tex. Civ. App. 261, 39 S. W. 181. But in Anderson v. Watts, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078, it is said that the husband of a defendant who has not been made a party to a foreclosure suit, but who joins his wife in an answer, will be bound by a decree.

[311] Neeson v. City of Troy, 29 Hun (N. Y.) 173; Groth v. Washburn, 39 Hun (N. Y.) 324; Selleck v. City of Janesville, 104 Wis. 570, 80 N. W. 944, 47 L. R. A. 691, 76 Am. St. Rep. 892; Walker v. City of Philadelphia, 195

surviving children against a railroad company for the death of their mother caused by the alleged negligence of the defendant, the plaintiffs are not concluded by a judgment rendered in a suit brought by their father, for himself only, upon the same cause of action, to which they were not parties.[312] So, a judgment rendered against the husband for property claimed as the separate property of the wife, in a proceeding against the husband to which the wife was not made an actual party, is not binding on the wife.[313] In an action by a married woman to recover for services rendered and board furnished to a decedent, a judgment by which she recovered for the services, but which denied a recovery for the board on the ground that it would be presumed to have been furnished by her husband, does not bar an action by the husband for the board, there being no privity between the plaintiffs in the two actions.[314] So again, an adjudication awarding the custody of a child to the respondent in a habeas corpus proceeding sued out by a married man is not binding on his wife, and does not estop her from prosecuting a like proceeding against the same respondent to obtain the custody of the child.[315] But of course this rule does not apply where the wife claims through or under her husband; in such case there is privity of estate between the parties, and a judgment binding on one concludes the other.[316] And it is held that a judgment in an action against a husband only, to determine adverse claims to land, bars an action by the husband and wife against the plaintiff therein, involving the same questions, though the land is community property.[317]

Pa. 168, 45 Atl. 657, 78 Am. St. Rep. 801. But see Ballou v. Ballou, 110 N. Y. 394, 18 N. E. 118, 1 L. R. A. 462.

[312] Galveston, H. & S. A. Ry. Co. v. Kutac, 72 Tex. 643, 11 S. W. 127.

[313] Read v. Allen, 56 Tex. 182.

[314] Stamp v. Franklin, 75 Hun, 373, 27 N. Y. Supp. 84.

[315] Taylor v. Neither, 108 Ga. 765, 33 S. E. 420.

[316] Campbell v. Ayres, 18 Iowa, 252; McConnell v. Day, 61 Ark. 464, 33 S. W. 731; Tanguey v. O'Connell, 132 Ind. 62, 31 N. E. 469; Mexia v. Lewis, 3 Tex. Civ. App. 113, 21 S. W. 1016; Whiteselle v. Jones (Tex. Civ. App.) 39 S. W. 405.

[317] Lichty v. Lewis. 23 C. C. A. 59, 77 Fed. 111.

§ 557. Guardian and Ward.

Where a suit is brought in the name of an infant by his guardian or next friend, the ward is concluded by the judgment, as to all issues raised and determined in the action.[318] But where the suit is instituted in the name of the guardian, describing himself as guardian, the ward is not a party, in such sense as to be bound by the decree.[319] A ward is not concluded or estopped by a judgment against the guardian, in an action brought upon the promise of the latter to pay for the education and maintenance of the ward; because, as such judgment binds only the guardian, and not the ward's estate, the latter could not control the management of the suit nor appeal from the judgment.[320] But in Louisiana it is held that a judgment regularly rendered between the new tutor and the former tutor of a minor, will sustain the plea of res judicata in an action brought by the minor, arrived at his majority, against his former tutor.[321]

§ 558. Decedent and Heirs.

An heir is in privity with his ancestor, and a devisee with his testator, so that either is concluded by an adjudication which was an estoppel upon his source of title.[322] Thus a judgment against a party in a suit brought by him as owner, for the recovery of certain land, may be pleaded as res judicata in a subsequent petitory action for the same land brought by his heirs.[323] Of course in such a case as this the conditions of privity are fully met. For the heir or devisee

[318] Chudleigh v. Chicago, R. I. & P. Ry. Co., 51 Ill. App. 491; Ross v. Enaut, 46 La. Ann. 1250, 15 South. 803.

[319] Swift v. Yanaway, 153 Ill. 197, 38 N. E. 589.

[320] Morris v. Garrison, 27 Pa. 226.

[321] Porche v. Ledoux, 12 La. Ann. 350.

[322] Avegno v. Schmidt, 113 U. S. 293, 5 Sup. Ct. 487, 28 L. Ed. 976; Shields v. Shiff, 124 U. S. 351, 8 Sup. Ct. 510, 31 L. Ed. 445; Wadsworth v. Murray, 161 N. Y. 274, 55 N. E. 910, 76 Am. St. Rep. 265; Williams v. Tomlin (Va.) 28 S. E. 883; Boykin v. Cook, 61 Ala. 472; Ladd v. Durkin, 54 Cal. 395; Christie v. Bishop, 1 Barb. Ch. (N. Y.) 105.

[323] Sharkey v. Bankston, 30 La. Ann. 891. But judgments against plaintiff's ancestor, in suits for partition and for specific performance in relation to land in suit, do not estop plaintiff from claiming the same under a subsequently accruing title. Whitney v. Nelson, 33 Wis. 365.

both claims under the former owner and after the judgment constituting the estoppel.

§ 559. Decedent and Representatives.

An administrator, so it is held, is in privity with his intestate so far as concerns the personalty.[324] But an executor is in privity with the testator only so far as, by the terms of the will, he succeeds to the position of the decedent.[325] Where, pending an action, one of the defendants dies, and on the plaintiff's motion his executor is substituted, and no notice is served on the executor, and he does not appear nor adopt the answer of his testator as his own, and the testator is named in the judgment, the rights of the executor are not affected by the trial and judgment, and the judgment is a nullity so far as he is concerned.[326]

§ 560. Administrator and Heir or Devisee.

At common law, there is no privity between the executor or administrator of an estate and the heirs and devisees, and consequently a judgment against the former is not evidence against the latter in a matter affecting the realty.[327] "A judgment against an administrator," says the supreme court of Pennsylvania, "is conclusive as to the personal estate, but only prima facie as to the realty. Heirs and devisees have a right to a day in court before their interests can be

[324] Steele v. Lineberger, 59 Pa. 313.

[325] Manigault v. Deas' Adm'rs, Bailey, Eq. (S. C.) 283; Ladd v. Durkin, 54 Cal. 395.

[326] McCreery v. Everding, 44 Cal. 284.

[327] Osgood v. President, etc., of Manhattan Co., 3 Cow. (N. Y.) 612, 15 Am. Dec. 304; Steele v. Lineberger, 59 Pa. 313; McCoy v. Nichols, 4 How. (Miss.) 31; Stewart v. Montgomery, 23 Pa. 410; Garnett v. Macon, 6 Call (Va.) 308, Fed. Cas. No. 5,245; Stone v. Wood, 16 Ill. 177; Jones v. Wilkey (C. C.) 78 Fed. 532; In re Vedder's Estate, 62 Hun, 275, 17 N. Y. Supp. 93; Eayrs v. Nason, 54 Neb. 143, 74 N. W. 408; Andrews v. Anderson (Miss.) 16 South. 346; Beck v. Kallmeyer, 42 Mo. App. 563; Clark v. Bettelheim, 144 Mo. 258, 46 S. W. 135; Hunt v. Russ, 7 Mackey (D. C.) 527; Merchants' Nat. Bank v. Good, 21 W. Va. 455; Dorr v. Stockdale, 19 Iowa, 269; Moss v. McCullough, 5 Hill (N. Y.) 131; Alston v. Munford, 1 Brock. 266, Fed. Cas. No. 267; Boykin v. Cook, 61 Ala. 472; Lehman v. Bradley, 62 Ala. 31; Teague v. Corbitt, 57 Ala. 529; Laidley v. Kline, 8 W. Va. 218; Chant v. Reynolds, 49 Cal. 213.

affected by a judgment against the administrator, and they may question and disprove any and every item included in or constituting the judgment against the administrator, if they can; so that, in fact, the only importance of the judgment against the administrator, so far as the realty is concerned, is that it is prima facie evidence of a debt due by the estate, and the foundation for a proceeding to try whether or not the realty is chargeable with it." [328] The most important application of this rule is in the case where a claim allowed by the probate court, or a judgment recovered against the administrator, in another court, is sought to be charged upon the land. Thus, when the administrator applies for leave to sell real estate for the purpose of paying a judgment against him, rendered at the suit of a creditor of the estate, the judgment is not conclusive upon the heirs at law, but they may contest the application. The judgment will be presumptive evidence of the existence of a debt against the estate, but the heirs may disprove that fact, may impeach the judgment on the ground that it was recovered by the fraud or collusion of the administrator, may set up defenses which he omitted to make, or may show that there is no deficiency of assets to pay it.[329] It is the same when the interests of the heirs are proceeded against, not by an application of the administrator, but by their being made defendants to a creditors' bill to subject the real estate to the payment of a judgment recovered against the personal representative. They are not concluded by the judgment. They may make any defenses against the alleged debt which the decedent if living might

[328] Steele v. Lineberger, 59 Pa. 313.

[329] Stone v. Wood, 16 Ill. 177; Gaither v. Welch's Estate, 3 Gill & J. (Md.) 259; Nichols v. Day, 32 N. H. 133, 64 Am. Dec. 358. The rule is otherwise in Ohio. It is there held that where an action is brought against an administrator on a liability contracted by the intestate, resulting, though contested in good faith and with due diligence, in a judgment against the administrator, such judgment, remaining unreversed and unsatisfied, is conclusive evidence of indebtedness against the estate, on the administrator's subsequent application for an order to sell the realty. Faran v. Robinson, 17 Ohio St. 242, 93 Am. Dec. 617. And in South Carolina it is said: "It has been uniformly held that the lands of a decedent may be sold under a judgment recovered against the administrator, even though the heirs were not parties to the proceeding in which the judgment was recovered." But the court added that this doctrine should not be extended further than the decided cases imperatively demand. Wilson v. Kelly, 19 S. C. 160.

have made, or which would have been available to the personal representative in the action at law, and may also set up defenses which the latter has, by his own acts or laches, precluded himself from making.[330] But this right of defending does not extend to mere technical objections or irregularities, not going to the question of the liability of the ancestor for the debt, sufficiency of assets, or other meritorious defenses.[331] However, the heir is not estopped to set up the defense of the statute of limitations.[332] The same general principles govern other cases in which transactions primarily concerning the administrator are liable to affect the interests of the heirs. Thus an administration account, settled in a cause in which the heirs are not parties, is not competent evidence as against them.[333] But it is said that a judgment of the probate court, in an action against an administrator, allowing, as a valid claim against the estate, a purchase note given by the intestate, secured by a vendor's lien, is conclusive on the heirs, as well as the administrator, in an action by the vendor to foreclose his lien.[334] But a decree of insolvency merely ascertains, as between the personal representatives and the creditors, the status of the estate; as to the heirs at law or the legatees, it is res inter alios acta, not affecting their rights, and not evidence against them of any fact ascertained by it.[335] On the principle of the mutuality of estoppels, the converse of our main proposition is equally true. That is to say, a judgment rendered in a cause to which the heirs only were parties is not binding upon the administrator of the estate.[336]

[330] Sharpe v. Freeman, 45 N. Y. 802; Wood v. Byington, 2 Barb. Ch. (N. Y.) 387; Burnham v. Burnham, 46 App. Div. 513, 62 N. Y. Supp. 120; Darrington v. Borland, 3 Port. 9; Teague v. Corbitt, 57 Ala. 529; Lehman v. Bradley, 62 Ala. 31; Scott v. Ware, 64 Ala. 174; Brewis v. Lawson, 76 Va. 36; Watts v. Taylor's Adm'r, 80 Va. 627; Daingerfield v. Smith, 83 Va. 81, 1 S. E. 599; Hobbs v. McMakin (Ky.) 4 S. W. 793.

[331] Buntyn v. Holmes, 9 Lea (Tenn.) 319.

[332] Starke v. Wilson, 65 Ala. 576.

[333] Robertson v. Wright, 17 Grat. (Va.) 534. And see Gairdner v. Tate, 110 Ga. 456, 35 S. E. 697.

[334] Moody v. Peyton, 135 Mo. 482, 36 S. W. 621, 58 Am. St. Rep. 604.

[335] Randle v. Carter, 62 Ala. 95.

[336] Dorr v. Stockdale, 19 Iowa, 269; Forbes v. Douglass, 175 Mass. 191, 55 N. E. 847. But see Hardaway v. Drummond, 27 Ga. 221, 73 Am. Dec. 730.

The rule that there is no legal privity between the administrator and an heir or devisee is the rule of the common law, and, as we have seen, it prevails in a majority of the states. But in several of the states on account of the statutory provisions relative to the powers and duties of personal representatives, a contrary doctrine obtains. In California, it is held that when an administrator sues in ejectment to recover the land of his intestate, and alleges the seisin of the deceased, and issue is joined on this point, and judgment rendered, the judgment binds the heirs of the intestate and all persons claiming under them, and is conclusive evidence against them.[337] In Florida, under statutes making real estate of a decedent assets in the hands of his personal representative for the payment of debts, a decree foreclosing a mortgage executed by an intestate, rendered in a suit to which the administrator only was a defendant, is binding on the heir.[338] In Louisiana, the claim of a creditor of a succession, established by a judgment obtained against the executor after a contestatio litis, cannot be examined at the suit of the heirs, but must be classed as a liquidated debt of the succession.[339] In Indiana, a similar rule obtains;[340] and in North Carolina, in the absence of fraud or collusion, a judgment against a personal representative of a decedent is conclusive against the heirs or devisees.[341]

Without going so far as this, there are certain generally recognized instances in which a judgment for or against the administrator will be at least admissible in evidence as against the heirs, although it may not bind them imperatively. Thus a judgment recovered against the personal representatives of a decedent, though not conclusive, is prima facie evidence of the amount of the debt, in a scire facias against the heirs brought for the purpose of charging the realty.[342] So it is held that in a suit for specific performance of

[337] Cunningham v. Ashley, 45 Cal. 485; Lloyd v. Ball (D. C.) 77 Fed. 365.

[338] Merritt v. Daffin, 24 Fla. 320, 4 South. 806.

[339] Neal v. Faggert, 28 La. Ann. 322; Genella v. McMurray, 49 La. Ann. 988, 22 South. 198; Texas & P. R. Co. v. Smith, 33 C. C. A. 648, 91 Fed. 483; Woodward v. Thomas, 38 La. Ann. 238.

[340] Chicago & E. R. Co. v. Harshman, 21 Ind. App. 23, 51 N. E. 343.

[341] Hinton v. Pritchard, 126 N. C. 8, 35 S. E. 127.

[342] Sergeant's Heirs v. Ewing, 36 Pa. 156; Stone v. Wood, 16 Ill. 177. So,

a contract for the sale of land against an executor, a decree rendered against him is conclusive against the heirs, in the absence of fraud.[343] In an English case, in a creditors' suit for administration of the real and personal estate of a testator, a judgment recovered against the executors (who were also trustees of the realty) was held to be prima facie evidence of a debt as against the persons interested in the real estate; but they were to be at liberty to adduce rebutting evidence.[344] It is finally to be observed that, in some circumstances, there is privity between the administrator and the distributees of the personalty. Thus, an administrator having been a party to a bill, and consented to a decree thereunder, by which his accounts were settled and the debts marshalled and their payment arranged, the distributees of the estate are to be considered as represented by him, and, in the absence of collusion between the administrator and the other parties, they are bound by the decree.[345] But it has also been held that a judgment rendered in an action had between the administrator and the heirs is not binding or conclusive upon the legatees.[346] Of course it will be understood that if heirs or devisees are joined as parties in a suit to which the executor or administrator is the principal defendant (or plaintiff), they will be equally concluded by the adjudication.[347]

§ 561. Executor and Legatee.

The executor of an estate is in privity with a legatee of personalty until the legacy is delivered, and consequently the latter is concluded

in a proceeding by the representative of a deceased partner for a settlement of the affairs of the firm, the court may determine whether or not there is any real property which could descend to the heirs, and its decision as to such a matter is conclusive on the heirs, though they were not parties to the proceeding. Darrow v. Calkins, 6 App. Div. 28, 39 N. Y. Supp. 527.

[343] Shannon v. Taylor, 16 Tex. 413.

[344] Harvey v. Wilde, L. R. 14 Eq. 438.

[345] Barclay v. Kimsey, 72 Ga. 725. See People v. Lease, 71 Ill. App. 380; Pittel v. Fidelity Mut. Life Ass'n, 30 C. C. A. 21, 86 Fed. 255. Compare Wright v. Phillips, 56 Ala. 69.

[346] Valsain v. Cloutier, 3 La. 170. 22 Am. Dec. 179.

[347] Judd v. Ross, 146 Ill. 40, 34 N. E. 631; Lantz v. Maffett, 102 Ind. 23, 26 N. E. 195; Martin v. Barnhill (Ky.) 56 S. W. 160.

by a judgment against the former.[348] Thus a judgment regularly obtained against an executor by one who claims a debt due from the testator is conclusive against the executor and the estate in his hands unadministered, as to the existence and the amount of the debt; and legatees cannot go behind the judgment, by pointing out a defense (such as the statute of limitations), which the executor might have made but did not.[349] But a judgment against an executor is not binding on legatees when the suit is commenced or revived after the executor's accounts have been settled and all the property in his hands paid over to distributees, pursuant to a decree of the proper court; for the trust is then practically terminated, the executor is devested of all control over the property, and privity between him and the legatees is terminated.[350] Nor is a judgment against an executor conclusive upon legatees so far as their legacies are charged upon and payable out of realty.[351] And it has been held that a judgment, rendered in a suit brought by an executor for the construction of the will, holding a certain bequest to be valid, is not binding on other legatees who were not parties to the proceeding.[352]

§ 562. Successive Administrators.

Although an administrator de bonis non is bound and concluded by the rightful administration of his predecessor,—by all acts done within the line of his duty and authority, which are not tainted with fraud; not only by all completed acts of administration, but by all matters of evidence that would affect creditors, legatees, and distributees,[353]—yet, as there is no technical privity between an admin-

[348] Redmond v. Coffin, 17 N. C. 437; Hooper v. Hooper, 32 W. Va. 526, 9 S. E. 967; Morris v. Murphey, 95 Ga. 307, 22 S. E. 635, 51 Am. St. Rep. 81; Bell v. Bell, 25 S. C. 149.

[349] Castellaw v. Guilmartin, 54 Ga. 299.

[350] Carey v. Roosevelt (C. C.) 81 Fed. 608. But if legatees make themselves privies to an action brought against the executor or administrator after his discharge, voluntarily assuming the expense of its defense, they are bound by the judgment against him. Carey v. Roosevelt (C. C.) 83 Fed. 242.

[351] First Baptist Church v. Syms, 51 N. J. Eq. 363, 28 Atl. 461.

[352] Shipman v. Rollins, 98 N. Y. 311. But compare Appeal of Buckingham, 60 Conn. 63, 22 Atl. 509.

[353] Martin v. Ellerbe's Adm'r, 70 Ala. 326.

istrator in chief and a succeeding administrator de bonis non, a judgment rendered against the former, according to the best authorities, is neither conclusive nor admissible against the latter.[354] Thus, where a decree of a court of chancery for a sum of money was obtained against an executor, it was held that such decree could not be made the foundation of a suit against an administrator de bonis non cum testamento annexo.[355] And conversely, a judgment against the administrator de bonis non of a debtor, is not evidence of the debt as against the representative of the administrator in chief.[356] When we reflect that the executor of an executor is bound as a privy by a judgment or other estoppel against his predecessor, the doctrine just stated may appear somewhat anomalous. But the reason of the distinction, as explained by Dr. Bigelow, is found in the fact that an executor, deriving his power from the special confidence reposed in him by the testator, is allowed to transmit that authority to another; whereas an administrator acts merely as an officer of the court appointing him, and cannot transmit his authority, and has no connection with his successor, further than that they both represent the same decedent.[357]

§ 563. Principal and Ancillary Administrator.

Where letters of administration upon the same estate are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; nor, if the one recovers a judgment against a debtor of the estate, can the other sue upon it as a cause of action accruing to himself; for in contemplation of law there is no privity between the principal and the ancil-

[354] Martin v. Ellerbe's Adm'r, 70 Ala. 326; Thomas v. Sterns, 33 Ala. 137; Rogers v. Grannis, 20 Ala. 247; Coleman v. McMurdo, 5 Rand. (Va.) 51; Graves' Adm'r v. Flowers, 51 Ala. 402, 23 Am. Rep. 552; Hummel v. First Nat. Bank, 2 Colo. App. 571, 32 Pac. 72. Compare Green v. Huggins (Tenn.) 52 S. W. 675; Yocum v. Commercial Nat. Bank, 195 Pa. 411, 46 Atl. 94.

[355] Alsop v. Mather, 8 Conn. 584, 21 Am. Dec. 703.

[356] Thomas v. Sterns, 33 Ala. 137.

[357] Bigelow, Estop. 100.

lary administrator.[358] In one of the earlier cases on this subject the United States supreme court remarked: "These administrations were independent of each other; the respective administrators represented M., the deceased intestate, by an authority co-extensive only with the state where the letters of administration were granted, and had jurisdiction of the assets there, and were accountable to creditors and distributees according to the laws of the state granting the authority. No connection existed, or could exist, between them, and therefore a recovery against the one in Tennessee was not evidence against the other in Mississippi." [359] Again, there is no such privity between an executor, acting under authority of the probate court at the decedent's domicile, and an ancillary administrator, deriving his powers from the probate court of another state, that a judgment against the administrator will be evidence against the executor. In deciding this point, the court in Massachusetts reasoned thus: "It is said that they are in privity with the testator, and that this creates a privity of estate between them. It is true that the executor is in privity with the testator in respect to the estate which he takes, which is merely the estate in Massachusetts and within the jurisdiction of its courts; and the administrator is in privity with him in respect to the estate in Vermont, which he can administer upon. But as the privity relates to different property and different matters, and is limited to different jurisdictions, it does not aid the plaintiff. There is no privity between the estate in the hands of the executor and that in the hands of the administrator. Each must be administered separately and independent-

[358] Aspden v. Nixon, 4 How. 467, 11 L. Ed. 1059; Stacy v. Thrasher, 6 How. 44, 12 L. Ed. 337; Hill v. Tucker, 13 How. 466, 14 L. Ed. 223; McLean v. Meek, 18 How. 16; Dent v. Ashley, 1 Hempst. 54, Fed. Cas. No. 3,809a; Taylor v. Barron, 35 N. H. 484; Grout v. Chamberlin, 4 Mass. 613; Talmage v. Chapel, 16 Mass. 71; Pond v. Makepeace, 2 Metc. (Mass.) 114; Low v. Bartlett, 8 Allen (Mass.) 259; Ela v. Edwards, 13 Allen (Mass.) 48, 90 Am. Dec. 174; Merrill v. New England Mut. Life Ins. Co., 103 Mass. 245, 4 Am. Rep. 548; Brodie v. Bickley, 2 Rawle (Pa.) 431; King v. Clarke, 2 Hill, Eq. (S. C.) 611; Latine v. Clements, 3 Kelly (Ga.) 426; Jones v. Jones' Heirs, 15 Tex. 463, 65 Am. Dec. 174; Carrigan v. Semple, 72 Tex. 306, 12 S. W. 178; Rosenthal v. Renick, 44 Ill. 202; Story, Confl. Laws, § 522; Bigelow, Estop. 255. Compare Suarez v. City of New York, 2 Sandf. Ch. 173.

[359] McLean v. Meek, 18 How. 16, 15 L. Ed. 277.

ly."[360] But the case is somewhat different with respect to two executors. Executors of the same decedent in different states are, as regards creditors of the estate, executors in privity, bearing to the creditors the same responsibilities as if there were only one executor. And although a judgment recovered against an executor qualified in one state is not conclusive upon an executor in another state, yet it may be admissible to show that the demand had been carried into judgment, and that the other executor was precluded by it from pleading prescription or the statute of limitations upon the original cause of action.[361]

§ 564. Administrator and Probate Purchaser.

There is no privity between an administrator and a purchaser under a sale by order of the court of probate. Consequently a decree in a suit to which the administrator was a party is not available to estop the purchaser, who was not a party.[362]

§ 565. Co-Heirs or Distributees.

There is no such privity between the co-heirs or distributees of an estate as will make a judgment against a part a bar to a suit in favor of the rest. Each is entitled in his own right to his share in the ancestor's estate, and to contest any conflicting claim. Such persons do not claim through or under one another, and hence a judgment against a part should not prevent the rest from being heard.[363]

§ 566. Surviving Partners and Representatives of Deceased.

A judgment recovered against the surviving member of a copartnership, for a debt alleged to have been due by the firm, in a suit in which the representatives of the deceased partner were not made

[360] Low v. Bartlett, 8 Allen, 259.

[361] Hill v. Tucker, 13 How. 458, 14 L. Ed. 223.

[362] Crandall v. Gallup, 12 Conn. 365.

[363] Walker v. Perryman, 23 Ga. 309; Farmer v. Farmer, 93 Ind. 435; Weeks v. Downing, 30 Mich. 4; Purdy v. Doyle, 1 Paige, 558; Weeks v. Ostrander, 52 N. Y. Super. Ct. 512; Good v. Good, 7 Watts, 195; Murray v. Stephens, 4 Strob. 352; Allegheny Nat. Bank v. Hays (C. C.) 12 Fed. 663.

parties, is not evidence as against such representatives of the indebtedness of the decedent, in a subsequent suit to charge his estate with the debt, there being no privity between the parties.[364] But such judgment would be admissible to prove the simple fact of a recovery against such surviving partner.[365] This latter fact might become relevant to the issues in such suit, in the easily supposed case where the plaintiff had to show the insolvency of the firm and of the surviving partner. Here the recovery of the judgment and return of an execution unsatisfied would be pertinent evidence. But as to the existence of a valid claim upon the decedent's estate, that would have to be proved by evidence outside the judgment.

§ 567. Warrantor and Warrantee.

It is a well settled rule that where one who has conveyed land to another, with warranty of title, is vouched in by the latter, upon due and proper notice, to defend an action of ejectment brought by a third person against the warrantee for the recovery of the same land, or voluntarily appears and assumes the defense, the judgment in ejectment, if given for the stranger, is conclusive evidence, in a subsequent action by the covenantee against his grantor, of the fact that the former has been evicted from his possession by a paramount title.[366] More precisely, "a person holding a covenant running with

[364] Trustees of Leake & Watts Orphan House v. Lawrence, 11 Paige (N. Y.) 80; Sturges v. Beach, 1 Conn. 507; Moore's Appeal, 34 Pa. 411; Runkel v. Phillips, 9 Phila. (Pa.) 619; Buckingham v. Ludlum, 37 N. J. Eq. 137.

[365] Sturges v. Beach, 1 Conn. 507.

[366] Smith v. Compton, 3 Barn. & Adol. 407; Williamson v. Williamson, 71 Me. 442; Andrews v. Davison, 17 N. H. 413, 43 Am. Dec. 606; Knapp v. Town of Marlboro, 34 Vt. 235; Turner v. Goodrich, 26 Vt. 707; Pitkin v. Leavitt, 13 Vt. 379; Chamberlain v. Preble, 11 Allen (Mass.) 370; Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; Belden v. Seymour, 8 Conn. 304, 21 Am. Dec. 661; Hinds v. Allen, 34 Conn. 195; Miner v. Clark, 15 Wend. (N. Y.) 425; Kelly v. Dutch Church of Schenectady, 2 Hill (N. Y.) 105; Adams v. Conover, 22 Hun, 424; Swenk v. Stout, 2 Yeates (Pa.) 470; Collingwood v. Irwin, 3 Watts (Pa.) 310; Ives v. Niles, 5 Watts (Pa.) 323; Terry's Ex'r v. Drabenstadt, 68 Pa. 400; Chapman v. Holmes' Ex'rs, 10 N. J. Law, 20; Wilson v. McElwee, 1 Strob. (S. C.) 65; Middleton v. Thompson, 1 Spears (S. C.) 67; Harbin v. Roberts, 33 Ga. 45; Wimberly v. Collier, 32 Ga. 13; Graham v. Tankersley, 15 Ala. 634; Cummings v. Harrison, 57 Miss. 275; Williams v. Leblanc, 14 La. Ann. 757; Hanrick v. Gurley, 93 Tex. 458, 56 S. W. 330; Thiele v. Axell,

the land, being sued for the land or on his covenant, may give notice to a prior grantor, in the chain of title, to sustain the title, and on failure to do so, the judgment may be read in evidence against him to show that the last covenantor had been sued, a judgment recovered against him, and that his covenant had not been performed, and the amount he had been compelled to pay; and in such a suit the plaintiff would not be required to prove the title under which the eviction was had, except that it was not a title derived from himself." [367] It is of course of no consequence to the result whether the person thus called in does in fact appear and defend or not. If he omits to do so, it is at his own risk. Nor, probably, is it material whether the judgment against the covenantee goes by default or is rendered after a trial of the issues.[368] But there must be a judgment, in order that the warrantor may be concluded. In ejectment, for example, although the covenant of warranty is not broken without eviction by paramount title, yet eviction by a judgment is not legally necessary to a breach of the covenant; the warrantee may voluntarily yield possession to a person having a better title, and then claim on the covenant; but this he does at his own peril, and in a suit against the warrantor the burden of proof is on the plaintiff to show the paramount title, whereas a judgment against him would have been conclusive of that fact.[369] It is further to be observed

5 Tex. Civ. App. 548, 24 S. W. 552; Graham v. Dyer (Ky.) 29 S. W. 346; Lord v. Cannon, 75 Ga. 300; Jones v. Waggoner's Adm'r, 7 J. J. Marsh. (Ky.) 144; Cox v. Strode, 4 Bibb (Ky.) 4; Davenport v. Muir, 3 J. J. Marsh. (Ky.) 310, 20 Am. Dec. 143; Williams v. Burg, 9 Lea (Tenn.) 455; Boyd v. Whitfield, 19 Ark. 469; King v. Kerr's Adm'rs, 5 Ohio, 158, 22 Am. Dec. 777; Harding v. Larkin, 41 Ill. 413; McConnell v. Downs, 48 Ill. 271; Chicago & N. W. R. Co. v. Northern Line Packet Co., 70 Ill. 221; Bever v. North, 107 Ind. 544, 8 N. E. 576; City of St. Louis v. Bissell, 46 Mo. 157; Wendel v. North, 24 Wis. 223; Mason v. Kellogg, 38 Mich. 132; Fitzpatrick v. Hoffman, 104 Mich. 228, 62 N. W. 349; Fleckton v. Spicer, 63 Minn. 454, 65 N. W. 926; Dalton v. Bowker, 8 Nev. 190; Rawle on Cov. for Title, § 117.

The only state in which this rule is distinctly repudiated is North Carolina. See Martin v. Cowles, 19 N. C. 101; Shober v. Robinson, 6 N. C. 33; Wilder v. Ireland, 53 N. C. 85.

[367] Chicago & N. W. R. Co. v. Northern Line Packet Co., 70 Ill. 221.

[368] See Chamberlain v. Preble, 11 Allen (Mass.) 370; Jackson v. Marsh, 5 Wend. 44. And see Brown v. Hearon, 66 Tex. 63, 17 S. W. 395.

[369] Callis v. Cogbill, 9 Lea (Tenn.) 137.

that when a warrantor, either voluntarily or upon notice, comes in to defend a suit against one to whom he is liable over, he comes in subject to all such reasonable rules and orders as the court may see fit to make in the cause. Hence, in a case where B. assumed the defense of a suit against A., to whom he was liable over, and the court ordered him, upon the motion of A., to furnish A. security for the costs, and thereupon B. abandoned the defense without complying with such order, it was considered that he was concluded by a judgment against A. the same as though he had made full defense.[370]

This same rule of estoppel will also apply to cases where the responsibility over rests upon other covenants than the warranty of title. Thus, in a case in New York, it appeared that certain land, upon which stood a mill and dam, was conveyed by a deed with covenant for quiet enjoyment. The grantee entered and operated the mill, maintaining the dam at the same height at which it was when the conveyance was made. An adjoining owner sued him for damages for overflowing his lands and recovered judgment. The grantor was duly notified of the action; and afterwards the grantee sued for breach of the covenant of quiet enjoyment. It was held that the judgment conclusively established against the covenantor that he had no right, at the time of the conveyance, to maintain the dam at that height, and also established a breach of said covenant.[371]

When a party institutes a suit founded upon a title which his grantor has covenanted to warrant, and the defendant sets up a title adverse to and inconsistent with the title thus warranted, the grantor may be notified to come in and defend against that title, in the same manner that he may be notified to defend against an adverse title set up in an action against his grantee. And when so called in, he will, in the same manner and to the same extent, be bound by the result of the litigation.[372] But "the right of a plaintiff to give notice may be limited to cases where, in some form, a defense involving the title

[370] Colburn v. Pomeroy, 44 N. H. 19.

[371] Adams v. Conover, 22 Hun, 424. Compare Poley v. Lacert, 35 Or. 166, 58 Pac. 37.

[372] Andrews v. Denison, 16 N. H. 469, 43 Am. Dec. 565; Anderson v. Bigelow, 16 Wash. 198, 47 Pac. 426; Brown v. Taylor, 13 Vt. 631, 37 Am.

warranted has been set up. If he might give the notice upon the institution of his suit, without any knowledge whether the defense would involve the validity of the title warranted and the covenant of warranty, it would, in effect, be a notice to come in and prosecute the suit, which would not be a good notice." [373] In at least one state, the right to thus call in the warrantor is secured to the plaintiff by statute.[374]

§ 568. Defenses Open to Warrantor.

But although the judgment against the warrantee is in general conclusive upon the warrantor when the latter had notice, there are still some defenses which are open to him in a subsequent action against him by the warrantee, viz., that the recovery was upon a title derived from the warrantee himself, or in consequence of some fact occurring after the date of the covenant, or that his covenant was special, or that it did not run with the land, or that he made no covenant.[375] Thus, where the warrantor is called in to defend, and succeeds in showing that the agreement was only for a special warranty (in which form his deed was drawn), and that the plaintiff in the suit does not claim through or under him, and on that ground has judgment, this will bar a subsequent action against him by the grantee, the character of the warranty agreed upon being thereby determined.[376] This point is further elucidated by an interesting case from South Carolina, in which the facts were as follows: A. conveyed a tract of land to B. with warranty, and B. in turn conveyed it to C. Afterwards D. entered upon the land, and was made defendant to an action by C. C., however, was defeated in this action, and D. was established in the possession of a portion of the land. C. then sued B. upon his deed and warranty, and the latter vouched

Dec. 618; Pitkin v. Leavitt, 13 Vt. 379; Gragg v. Richardson, 25 Ga. 566, 71 Am. Dec. 190; White v. Williams, 13 Tex. 258; Rawle, Cov. § 118. A contrary view is maintained in Tennessee. Ferrell v. Alder, 8 Humph. (Tenn.) 44.

[373] Andrews v. Denison, 16 N. H. 469, 43 Am. Dec. 565.

[374] Code La., art. 2495.

[375] Chicago & N. W. R. Co. v. Northern Line Packet Co., 70 Ill. 221; Davenport v. Muir, 3 J. J. Marsh. (Ky.) 310, 20 Am. Dec. 143; Twambly v. Henley, 4 Mass. 441.

[376] Monks v. McGrady, 71 Tex. 134, 8 S. W. 617.

A., his warrantor, to come in and defend the title, but A. omitted to appear, and C. recovered against B. Thereupon B. brought his action of covenant against A. upon his covenants of seisin, quiet enjoyment, and general warranty. In this last action the plaintiff introduced in evidence the record of the action of C. against D. It was held that this record was admissible to show the quantum of damages sustained by B., and to show eviction by title paramount to B.'s, but that A. had a right to show that, notwithstanding the eviction was by title paramount to B.'s, yet it was not paramount to his title; but if he failed to do so, the verdict was conclusive against him.[377] Further, it is held that where a grantor in a deed has once responded to a suit on his covenant of warranty, brought by a proper party, he is not liable to a second suit on the same covenant; and the judgment obtained against him in the first suit is admissible as evidence in the second.[378]

§ 569. Requisites of Notice to Warrantor.

We have said that the warrantor must have notice of the action against his grantee, in order to be bound by the result. By this is meant a notification proceeding from the latter. Merely that he knew of the action and talked about it, and intimated that he had evidence which would defeat it, is not enough.[379] And the mere fact that a person testifies as a witness on the trial of a suit is not sufficient evidence that he had such legal notice as the law intends him to receive, in order to be bound by the judgment.[380] Although if he actually appears and openly and actively assumes the defense, it will be presumed that he was duly notified.[381] In regard to the character of the notice, the books say that it must be unequivocal, certain, and explicit, but that it need not appear of record, and that no particular form of words is required.[382] Whether the notice must

[377] Middleton v. Thompson, 1 Spears (S. C.) 67.
[378] Vancourt v. Moore, 26 Mo. 92; Brady v. Spurck, 27 Ill. 478.
[379] Paul v. Witman, 3 Watts & S. 409.
[380] Lebanon v. Mead, 64 N. H. 8, 4 Atl. 392.
[381] Harding v. Larkin, 41 Ill. 413.
[382] Greenlaw v. Williams, 2 Lea (Tenn.) 533; Williams v. Burg, 9 Lea (Tenn.) 455; Paul v. Witman, 3 Watts & S. (Pa.) 410; Boyd v. Whitfield,

be in writing or not, is a point not so definitely settled. Good authority may be cited for the view that it will not answer its purpose unless written.[383] But the prevalent opinion appears to be that a parol notice, if certain, explicit, and otherwise good, will be fully sufficient.[384] Thus it is said by the supreme court of Minnesota: "This notice must be clear and explicit, and convey precise information that unless the person to whom it is addressed establishes the validity of the title in the first action, he will be estopped by the judgment. But no case has decided that the notice should be in any particular form. In some it is suggested that it would be better if notice in writing were required, but most of the cases assume that if sufficient in substance it need not be in writing; and except for facility in proving it, and certainty as to its character, we see no reason why it should be written or formal. If it clearly apprise the person to whom it is given that an action involving the title has been commenced, and that the defendant giving it looks to him to establish the title in that action, the object of the notice is accomplished." [385]

§ 570. Warrantor must have an Opportunity to Defend.

In order that the warrantor may be bound by the result of the litigation, it is not only necessary that he should be notified of the suit, as above described, but it is also essential that he should have a fair and full opportunity to defend his title and to avail himself of every

19 Ark. 447; Davis v. Wilbourne, 1 Hill (S. C.) 27, 26 Am. Dec. 154; Somers v. Schmidt, 24 Wis. 421, 1 Am. Dec. 191; Collins v. Baker, 6 Mo. App. 588; Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 144 N. Y. 663, 39 N. E. 360. But the notice must not only inform the covenantor of the pendency of the action, but must also call upon him to defend the title. Teague v. Whaley, 20 Ind. App. 26, 50 N. E. 41; Consolidated Hand-Method Lasting-Mach. Co. v. Bradley, 171 Mass. 127, 50 N. E. 464, 68 Am. St. Rep. 409.

[383] Mason v. Kellogg, 38 Mich. 132; Rawle, Cov. § 119. And see Somers v. Schmidt, 24 Wis. 417, 1 Am. Dec. 191.

[384] Ferrea v. Chabot, 63 Cal. 564; Miner v. Clark, 15 Wend. (N. Y.) 427; Cummings v. Harrison, 57 Miss. 275; Walton v. Campbell, 51 Neb. 788, 71 N. W. 737. See Richmond v. Ames, 164 Mass. 467, 41 N. E. 671.

[385] Hersey v. Long, 30 Minn. 114, 14 N. W. 508.

legal means of avoiding an adverse judgment.[886] And this privilege extends to the right to move in arrest, move for new trial, take a statutory new trial, appeal from the judgment, and generally resort to any and all remedies which would be open to the original defendant. Thus it is said: "Where a grantee seeks to conclude a grantor in an action on the covenants of the deed, by the result of the suit in which the grantee was ousted under an alleged paramount title, it should appear not only that the grantor was notified of the suit and requested to defend it, but that he was allowed to do so to the utmost extent of the law, if he desired to. Otherwise a defendant in ejectment might acquiesce in an erroneous result of a trial, and refuse his grantor an opportunity to correct it by appeal, and still conclude him by the judgment in an action on his covenants. This would be clearly unjust. And it would be equally so to allow the grantee to acquiesce arbitrarily in the result of a first trial in ejectment, and conclude his grantor by it, refusing the latter the privilege of taking the second trial allowed by the statute and conducting the litigation farther. That being a statutory right in this particular action, its refusal to the grantor is denying him a full opportunity to use legal remedies to defend the title he had covenanted to defend, as much as it would be to refuse him the right to appeal."[887] In such a case, therefore, the judgment against the grantee would clearly not be binding and conclusive upon the grantor.

§ 571. Effect of Judgment when Warrantor is not Notified.

If the warrantor is not notified to come in and defend the action against his grantee, what effect is to be given to the judgment rendered therein, when the latter subsequently sues for the breach of the warranty of title? On this question there is some diversity of opinion. In one state the decisions seem to favor the view that the judgment is prima facie, though not conclusive, evidence of the superior title of the person who recovered it, it being still open to the

[886] Saveland v. Green, 36 Wis. 612; Axford v. Graham, 57 Mich. 422, 24 N. W. 158.

[887] Eaton v. Lyman, 26 Wis. 61.

warrantor to make any defenses he can against the judgment and to show (assuming the burden of proof) the validity of his own title.[388] But this position is not generally approved. According to the decided preponderance of authority, the record in the former suit will be admissible against the warrantor to prove the fact of eviction,—that the grantee was ousted by a judgment of a court (which, however, is no more than the familiar truth that a judgment is always evidence of its own existence),—but it will not be admissible at all, not even as prima facie evidence, to show that the eviction was had under a paramount title.[389]

§ 572. Warrantor of Personal Property.

The same general principles which have been expounded in the five preceding sections apply also to cases of sales of personal property. Where there is an express or implied warranty of title, and the goods are taken from the vendee by a judgment in a suit against him by a third person, of which action the vendor was duly notified and was requested to defend, the latter is conclusively bound by such judgment.[390] "The vendor in possession of personal property impliedly warrants the title to the thing sold. He is therefore bound to make good to the purchaser all his losses resulting from the want

[388] Collingwood v. Irwin, 3 Watts (Pa.) 310; Paul v. Witman, 3 Watts & S. (Pa.) 407.

[389] Cox v. Strode, 4 Bibb (Ky.) 4; Booker's Adm'r v. Bell's Ex'rs, 3 Bibb (Ky.) 173, 6 Am. Dec. 641; Knapp v. Town of Marlboro, 31 Vt. 674; Everling v. Holcomb, 74 Iowa, 722, 39 N. W. 117; Sisk v. Woodruff, 15 Ill. 15; Stephens v. Jack, 3 Yerg. (Tenn.) 403, 24 Am. Dec. 583; Tam v. Shaw, 10 Ind. 469; Hardy v. Nelson, 27 Me. 525; Graham v. Tankersley, 15 Ala. 645; Rhode v. Green, 26 Ind. 83; Walton v. Cox, 67 Ind. 164; Clements v. Collins, 59 Ga. 124; Hanson v. Buckner's Ex'r, 4 Dana (Ky.) 254, 29 Am. Dec. 401; McGregor v. Tabor (Tex. Civ. App.) 26 S. W. 443; Ryerson v. Chapman, 66 Me. 557; Wilder v. Ireland, 53 N. C. 87.

[390] Boyd v. Whitfield, 19 Ark. 447; Brown v. McMullen, 1 Hill (S. C.) 29; Barney v. Dewey, 13 Johns. (N. Y.) 224, 7 Am. Dec. 372; Pickett's Ex'rs v. Ford, 4 How. (Miss.) 246; Blasdale v. Babcock, 1 Johns. (N. Y.) 517; Marlatt v. Clary, 20 Ark. 251; Salle v. Light's Ex'rs, 4 Ala. 700, 39 Am. Dec. 317; Thurston v. Spratt, 52 Me. 204; Baltimore Steam Packet Co. v. Garrison, 6 Daly (N. Y.) 246; Buchanan v. Kauffman, 65 Tex. 235; Fallon v. Murray, 16 Mo. 168; Kelly v. Forty-Second St., M. & St. N. Ave. R. Co., 37 App. Div. 500, 55 N. Y. Supp. 1096.

of a good title. If the purchaser, or any subsequent vendee, is sued in replevin or trover, or in any other action involving the question of title, if he gives notice to his vendor of the pendency of the action and its nature, the judgment is conclusive evidence against such vendor. . . . . It can make no difference that there are intermediate purchasers, and that the suit is against the last one, if the question of title is the sole matter in controversy. All the individuals who have sold the property are alike warrantors, and can as well defend the title in the suit against the last purchaser as in a suit against themselves, if they have notice."[391] There are cases holding that this principle of estoppel upon a warrantor called in to defend applies only to cases where the title is involved, not to cases where the controversy turns upon the question of the soundness, quality, etc., of the chattel. Thus it is said that a judgment recovered against a seller of goods, for breach of an implied warranty of soundness, is not evidence which will enable him to recover against the person from whom he bought on a like warranty, even though the first seller was duly notified of the action.[392] But the principle is in fact often applied to cases where the title to the chattel is not so much in controversy as some collateral matter. Thus, where the assignor of a note warranted it free from set-off, and in a suit by the assignee against the maker, of which the assignor was notified and which he assisted in prosecuting, there was judgment for a set-off, it was held that in an action by the assignee against the assignor for deceit, such judgment was conclusive evidence of the set-off.[393] If the vendor was not notified of the action against his vendee, still, according to some of the cases, the judgment against the latter is prima facie evidence of the vendor's want of title, so as to throw up-

[391] Thurston v. Spratt, 52 Me. 204.

[392] Smith v. Moore, 7 S. C. 209, 24 Am. Rep. 479. In an action upon a covenant of warranty of the soundness of a slave the plaintiff cannot introduce as evidence the record of a judgment recovered against him, because of the unsoundness of the slave, by one to whom he had sold, subsequent to his own purchase from the defendant, with warranty of soundness; because the matters in issue in the two suits are different, viz., the soundness of the slave at two distinct times. But the court said the case would have been otherwise if the title had been the issue in each suit. Morgan v. Winston, 2 Swan (Tenn.) 472.

[393] Walker v. Ferrin, 4 Vt. 523.

on him the burden of proving his title.[394] But this doctrine has been denied.[395] And indeed it is difficult to distinguish this case, in principle, from the parallel case of a sale of land with warranty of title, where, as appears by the preceding section, if the warrantor was not notified, the judgment is not admissible even as prima facie evidence of the invalidity of his title, or the strength of that of the successful claimant.

§ 573. Indemnitors.

An obligation to indemnify upon notice that suit has been brought is also an obligation to defend the suit or to abide the consequences of a judgment, and the judgment will bind the indemnitor, when the latter is notified to defend and fails to do so.[396] The rules upon this subject were well stated in a certain New York decision, where the court said that covenants to indemnify against the consequences of a suit were of two sorts, the first class including cases where the covenantor expressly made his liability dependent on the event of a litigation to which he was not a party and stipulated to abide the result, and the second comprising cases where the covenant was one of general indemnity merely against claims or suits. In cases of the first class, said the court, the judgment would be conclusive evidence against the indemnitor, although he was not a party and had no notice, because its recovery was the very event against which he covenanted. But in cases of the second class, the judgment would be merely prima facie evidence against the indemnitor, and he might be let in to show that the principal had a good defense to the claim.

[394] Marlatt v. Clary, 20 Ark. 251.

[395] Roper v. Rowlett, 7 Lea (Tenn.) 320.

[396] City of Troy v. Troy & Lansingburgh R. Co., 3 Lans. (N. Y.) 270; Id., 49 N. Y. 657; Kip v. Brigham, 6 Johns. (N. Y.) 158; Trustees of Newburgh v. Galatian, 4 Cow. (N. Y.) 340; Beers v. Pinney, 12 Wend. (N. Y.) 309; Mehaffy v. Lytle, 1 Watts (Pa.) 314; Konitzky v. Meyer, 49 N. Y. 571. "It is a well settled rule that where one is bound to protect another from liability, he is bound by the result of a litigation to which such other was a party, provided he had notice of the litigation and an opportunity to control and manage it, the rule being subject to the qualification that the litigation must have been carried on without fraud or collusion, and conducted in a reasonable manner." Commercial Union Assur. Co. v. American Cent. Ins. Co., 68 Cal. 430, 9 Pac. 712.

And in both cases the indemnitor was of course to be understood as saving the right, which the law gives in every case where the suit is between third persons, of contesting the proceeding on the ground of a collusive agreement to put the charge upon him.[397] In pursuance of these principles, it is held that where the assignor of a mortgage covenants with the assignee that the property mortgaged will produce a given sum over and above the costs of foreclosing, and that if it does not he will pay the deficiency, the proceedings in the suit to foreclose will be conclusive evidence against the assignor, in an action on the covenant, to show the amount of the deficiency.[398] But on the other hand, in order to make a judgment against one of several former partners conclusive upon another partner, who, upon dissolution, assumed the firm debts, the evidence of notice to the latter of the bringing of the action in which the judgment was obtained must be very clear.[399] In an English case it appeared that A. had become surety for C., who was a collector of taxes, and that B. and C. had thereupon executed a joint and several indemnifying bond to A. Judgment was taken against A., at the suit of the receiver-general, for the default of C., and A. then sued B. upon the indemnity bond. It was held that the judgment against A. was evidence, in his suit against B., that he had been sued, but was not evidence of the amount he was legally liable to pay, because B. was not a party to that action.[400] The same general principle governs the case of actions upon indemnifying bonds given to officers of the law in the discharge of their duties. Where, for example, the plaintiff in an execution gives to the sheriff a bond to hold him harmless for selling property levied on under the execution, and the sale is made, and the real owner then recovers against the sheriff in trespass, such judgment is evidence, in a subsequent action by the sheriff against the indemnitor, that the real owner had asserted his claim, and that what the sheriff has paid he was compelled to pay by legal proceedings, but it is not evidence that the claimant

[397] Bridgeport F. & M. Ins. Co. v. Wilson, 34 N. Y. 275.

[398] Rapelye v. Prince, 4 Hill (N. Y.) 119, 40 Am. Dec. 267. See Drennan v. Bunn, 124 Ill. 175, 16 N. E. 100, 7 Am. St. Rep. 354.

[399] Reed v. Orton (Pa.) 6 Atl. 369. See Taylor v. Barnes, 69 N. Y. 430.

[400] King v. Norman, 4 C. B. 884.

against the sheriff was the real owner of the property, unless the obligor in the indemnity bond had notice of the suit and an opportunity to make defense in it.[401]

§ 574. Persons Responsible Over.

"The rule seems to be established that when a person is responsible over to another, either by operation of law or by express contract, and notice has been given him of the pendency of the suit, and he has been requested to take upon himself the defense of it, he is no longer regarded as a stranger to the judgment that may be recovered, because he has the right to appear and defend the action equally as if he were a party to the record. When notice is thus given, the judgment, if obtained without fraud or collusion, will be conclusive against him whether he has appeared or not." [402] For example, where the person injured by the escape of an imprisoned debtor has recovered judgment against the sheriff for his damages sustained by reason of such escape, and the sheriff in turn sues the county, claiming damages on the ground that the escape would not have occurred if the county had fulfilled its duty in providing a jail, the record of the former judgment is admissible in evidence for the purpose of showing the amount the sheriff had been compelled to pay.[403] So a judgment on the merits against an assignee, based upon matter prior to the assignment, the as-

[401] Burrill v. West, 2 N. H. 190; Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129; Miller v. Rhoades, 20 Ohio St. 494; Boynton v. Morrill, 111 Mass. 4; Stewart v. Thomas, 45 Mo. 44.

[402] Davis v. Smith, 79 Me. 351, 10 Atl. 55. Other cases holding this rule are Bailey v. Sundberg (D. C.) 44 Fed. 807; Lawrence v. Stearns (C. C.) 79 Fed. 878; Vigeant v. Scully, 35 Ill. App. 44; Knickerbocker v. Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595; Inhabitants of Veazie v. Penobscot R. Co., 49 Me. 124; Hardy v. Nelson, 27 Me. 530; City of Boston v. Worthington, 10 Gray (Mass.) 498, 71 Am. Dec. 678; Littleton v. Richardson, 34 N. H. 187, 66 Am. Dec. 759; Spencer v. Dearth, 43 Vt. 106; Inhabitants of Shrewsbury v. Inhabitants of Boylston, 1 Pick. (Mass.) 105; Prichard v. Farrar, 116 Mass. 213; Salle v. Light's Ex'rs, 4 Ala. 700, 39 Am. Dec. 317; Clark v. Carrington, 7 Cranch, 322, 3 L. Ed. 354; Hamilton v. Cutts, 4 Mass. 353, 3 Am. Dec. 222; Ward v. Bond, 1 Nott & McC. (S. C.) 201; Kip v. Brigham, 6 Johns. (N. Y.) 158; Walker v. Ferrin, 4 Vt. 523; Mehaffy v. Lytle, 1 Watts (Pa.) 314; Tyree v. Magness, 1 Sneed (Tenn.) 276.

[403] Commissioners of Brown Co. v. Butt, 2 Ohio, 348.

signor having been notified so that he might litigate, is a bar to a subsequent suit by the assignor.[404] So when an indorsee of a promissory note sues the maker, and notifies the indorser of the pendency of the suit, or advises him of any defense interposed, this will make the verdict conclusive against the indorser, if the maker is discharged, and it cannot be controverted when the indorser is sued.[405] Again, where the liability of a surety is contingent, and to be ascertained by an assessment of damages, a transcript of the judgment and proceedings against him, with proof of payment of the amount recovered, is competent, at least prima facie, evidence in a suit by him against the principal to recover the money so paid, even though the principal was not joined in the suit or notified of it.[406]

Further, the privity thus existing between the parties will enable the person secondarily liable to take advantage of an unsuccessful attempt to recover damages from the person primarily responsible. For example, a judgment on the merits in favor of the defendant in an action for injuries caused by an obstruction on a turnpike, against the person who placed the obstruction there, and in which the defendant pleaded contributory negligence on the part of the plaintiff, will bar a subsequent action against the turnpike company for the same injuries.[407]

In ascertaining the application of this rule, two very important limitations must be borne in mind. In the first place, the fact that notice of a pending suit has been given to a third person does not determine the question whether or not such person is in fact responsible over to the defendant, nor, generally, can that question be put in issue in the first suit, but it must be established as an independent fact in the subsequent action. Thus if one carrier is sued for the loss of goods, and notifies a second carrier, to whom he delivered the same for transportation, of the pendency of the suit,

[404] Tyree v. Magness, 1 Sneed (Tenn.) 276.

[405] Hagerthy v. Bradford, 9 Ala. 567; Brown v. Chaney, 1 Kelly (Ga.) 410; Morgan v. Simmons, 3 J. J. Marsh. (Ky.) 611.

[406] Bone v. Torry, 16 Ark. 83; Snider v. Greathouse, 16 Ark. 72, 63 Am. Dec. 54.

[407] Featherson v. President, etc., of Newburgh & C. Turnpike Co., 71 Hun, 109, 24 N. Y. Supp. 606. And see Hill v. Bain, 15 R. I. 75, 23 Atl. 44, 2 Am. St. Rep. 873.

and requires him to defend the same, the judgment against the first is not conclusive as to the question of the liability of the second. It is only conclusive on such privies as are liable over, and then only as to the fact that the judgment was recovered, and that it was for the value of the goods lost; but the judgment is not so far conclusive of the question of privity as to fix the liability of the person served with notice.[408]

In the second place, the scope of the estoppel created by the first judgment cannot be extended beyond the points and issues necessarily determined by it. Nor is the person responsible over precluded by it from setting up any defenses which, from the nature of the action or the pleadings, he could not have interposed in the first litigation had he been a formal party to it.[409] Thus a shipper against whom a judgment has been rendered for failure to deliver goods as agreed, by an assignee of the bill of lading, cannot maintain an action on such judgment against the carrier who had issued the bill of lading, although the carrier was notified of the pendency of the action and requested to defend, since the latter could not, had he been a party to the action, have set up the defenses available as

[408] Chicago & N. W. R. Co. v. Northern Line Packet Co., 70 Ill. 217. In this case, Walker, J., observed: "Whether such a relation exists as to make the notice an estoppel, to that extent, is an open question that may always be contested; but when it is shown that the relation does exist, and that a recovery over may be had against the person on whom the notice was served, then he is estopped to deny that the judgment was recovered against his privy, that the wrong was perpetrated, or [to allege] that the recovery was too large. In that case, the judgment may be read in evidence to show that there had been a recovery against the person first sued, and the amount he has been compelled to pay, as fixing the measure of damages, but the judgment is evidence for no other purpose." And see Missouri Pac. R. Co. v. Twiss, 35 Neb. 267, 53 N. W. 76, 37 Am. St. Rep. 437; Mayor, etc., of City of New York v. Brady, 70 Hun, 250, 24 N. Y. Supp. 296.

[409] See Oceanic Steam Nav. Co., Limited, v. Compania Transatlantica Espanola, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685; Consolidated Hand-Method Lasting-Mach. Co. v. Bradley, 171 Mass. 127, 50 N. E. 464, 68 Am. St. Rep. 409. A judgment recovered against a railroad company for negligently setting fire to property is not conclusive on the property owner as to the amount of his loss, as against an insurance company seeking to recover money paid to him on account of such loss before the recovery of the judgment. Ætna Ins. Co. v. Confer, 158 Pa. 598, 28 Atl. 153.

against the shipper.[410] This point is further illustrated by the case of Churchill v. Holt,[411] before the supreme judicial court of Massachusetts, wherein it appeared that A. was the occupant of a building connected with which there was a hatchway in the street leading into the basement; that the hatchway was once left open and unguarded; and that M., a passenger in the street, fell into it and was injured. M. sued A. for damages, and recovered a judgment, which A. paid. A. then sued B. for indemnity, alleging that the dangerous condition of the hatchway, on that occasion, was due to the negligent act of B.'s servant. It was held that the judgment in the suit of M. against the plaintiff was not conclusive against his right to maintain this action. The court said: "Under the pleadings in that suit, the judgment may have been rendered on the ground that the plaintiffs were liable as occupants of the building, without any regard to the question whether they or a stranger to the suit removed the cover or negligently left it unguarded. It conclusively shows that they were guilty of negligence in law as to the person injured, but it does not show that they were participes criminis with the defendants, and is not inconsistent with their right to maintain this action." [412]

§ 575. Judgment against City as Evidence in Action against Person Liable Over.

It is a well established rule, and one which has been recognized and enforced in a number of noteworthy cases, that a judgment recovered against a municipal corporation, for injuries caused by a defect or obstruction in the highway, is conclusive evidence of its necessary facts and conditions, in a subsequent action by the municipality against a third person, the author of the defect or nuisance, who is liable over, and who was notified of the first suit.[413]

[410] Garrison v. Babbage Transp. Co., 94 Mo. 130, 6 S. W. 701.

[411] 127 Mass. 165, 34 Am. Rep. 355.

[412] See, also, St. John v. St. John's Church, 15 Barb. (N. Y.) 346.

[413] Littleton v. Richardson, 34 N. H. 179, 66 Am. Dec. 759; Inhabitants of Veazie v. Penobscot R. Co., 49 Me. 119; City of Portland v. Richardson, 54 Me. 46, 89 Am. Dec. 720; Village of Seneca Falls v. Zalinski, 8 Hun (N. Y.) 571; Inhabitants of Milford v. Holbrook, 9 Allen (Mass.) 17, 85 Am. Dec. 735; Robbins v. Chicago, 4 Wall. 657, 18 L. Ed. 427; Washington Gaslight Co. v.

To illustrate,—in one of the cases cited it appeared that defendant was the owner of a building, the lower story of which he had leased for shops and portions of the upper story for various purposes, himself remaining in possession of the residue of the building; that there was an awning erected along the whole front of the building, for the benefit of the shops, but it was defective, and fell, injuring one Day who was passing beneath. Day brought his action for damages against the town, and the town gave notice of the action to defendant, requesting him to defend the same and stating that he would be held responsible if the town was adjudged liable. Day recovered judgment against the town, and the latter then brought the present action. It was held that the verdict and judgment against the town were conclusive evidence of the existence of a defect in the highway, the injury to the individual while he was in the exercise of due care, and the amount of the damages.[414] Contrary to the usual rule, some of the cases manifest a strong disposition to waive the important requirement of notice in these cases. The federal supreme court holds that it is not necessary that express notice should have been given to such third person to defend the suit against the municipal corporation, in order to make the judgment conclusive upon him, but it is sufficient if he knew that the suit was pending and could have defended it. "The legal presumption is that he knew that he was answerable over to the corporation, and if so, it must also be presumed that he knew he had a right to defend the suit." [415] But this view is not to be commended. It exhibits too wide a departure from the well settled rules which apply to all the cases where a third person, not a party or privy to a judgment, is sought to be concluded by it. The better reason, as it seems to us, is with the decisions holding that, while such notice

District of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712; Mayor, etc., of City of New York v. Brady, 151 N. Y. 611, 45 N. E. 1122; Catterlin v. City of Frankfort, 79 Ind. 547, 41 Am. Rep. 627; City of Boston v. Worthington, 10 Gray (Mass.) 496, 71 Am. Dec. 678; Village of Port Jervis v. First Nat. Bank, 96 N. Y. 550.

[414] Inhabitants of Milford v. Holbrook, 9 Allen (Mass.) 17, 85 Am. Dec. 735.

[415] Robbins v. Chicago, 4 Wall. 657, 18 L. Ed. 427; Chicago v. Robbins, 2 Black, 418, 17 L. Ed. 298. Compare City of Oskaloosa v. Pinkerton, 51 Iowa, 697, 1 N. W. 689; Lebanon v. Mead, 64 N. H. 8, 4 Atl. 392.

is not essential to the right of action against the person liable over, yet it is necessary to the conclusiveness of the judgment; that is, that the plaintiff in the second suit will be obliged to prove all the facts upon which his case depends, including those which, had he given the notice, would have been conclusively established by the judgment.[416] But in any case it is necessary for the municipality to prove that the defendant in its action was the author of the act whereby the individual was injured.[417] And further, the judgment does not preclude all possible defenses. Thus it is said: "A judgment obtained against a municipal corporation for injuries received on account of defects in a street caused by third persons, would, in a suit by such corporation, brought to recover back what it had been compelled to pay, be conclusive as to the right of the injured party to recover, and as to the amount which the municipal corporation would be entitled to recover. But the party against whom the municipal corporation might seek to recover would be entitled to show that it was under no obligation to keep the street in safe condition, or that it was not in fault, or that the accident was caused by the negligent conduct of both parties, in which event no recovery could be had, for the reason that one of two joint wrong-doers cannot have contribution from the other." [418] In other words, while

[416] Village of Port Jervis v. First National Bank, 96 N. Y. 550. In this case, Chief Justice Ruger observed: "The liability of the author of the act which occasions the injury does not depend upon the fact of his receiving notice of the action brought by the injured party against the municipality. . . . . The only object of notice in such a case is to enable the corporation to avail itself of its right to impose the burden of defense upon the party ultimately liable, and to estop the author of the injury, by the judgment recovered, from again contesting the facts upon which such judgment depends. The omission to give notice in such case does not go to the right of action, but simply changes the burden of proof, and imposes upon the party against whom the judgment was recovered the necessity of again litigating and establishing all of the actionable facts. But if the party who is ultimately responsible has notice of the pendency of an action against his indemnitee, and is given an opportunity to defend, and neglects it, he is still bound by the result of the action and estopped from controverting, in an action subsequently brought against him by such indemnitee, the facts which were litigated in the original action."

[417] City of Cohoes v. Morrison, 42 Hun (N. Y.) 216.

[418] Western & Atlantic R. R. v. City of Atlanta, 74 Ga. 774. And see City of St. Joseph v. Union Ry. Co., 116 Mo. 636, 22 S. W. 794, 38 Am. St. Rep. 626;

the indemnitor could not show that the injured individual was guilty of negligence, but that defense would be concluded by the former judgment, yet it might show contributory negligence (in common with itself) in the city, for that was not and could not have been litigated before.

§ 576. Intervening Claimants.

Where a third person intervenes in a pending action, for the purpose of claiming the fund or the chattel in controversy as his own, he is concluded by the judgment in that action, and cannot afterwards sue on the same claim, at least in respect of any title acquired prior to the intervention.[419] And conversely, if the issue raised by an intervener is decided in his favor, he may take advantage of the judgment in any subsequent litigation in which the same question is mooted and the same parties concerned.[420] But the intervener must actively and substantially make himself a party, in order to be bound.[421] Where one claiming personal property attached in an action against another appeared in such action, and took time to file a petition of intervention, but withdrew without filing such petition, it was held that he was not bound by any subsequent proceedings in the action.[422] In equity, where one not originally a party is permitted to file a petition in a pending suit, and to set up new and different rights from any involved in the original bill, such petition (at least as against a stranger to the suit, who,

Schaefer v. City of Fond du Lac, 99 Wis. 333, 74 N. W. 810, 41 L. R. A. 287; Hearn v. Boston & M. R. R., 67 N. H. 320, 29 Atl. 970.

[419] Gumbel v. Pitkin, 113 U. S. 545, 5 Sup. Ct. 616, 28 L. Ed. 1128; Order of Solon v. Gaskill, 192 Pa. 484, 43 Atl. 1085; Berry v. Chamberlain, 53 N. J. Law, 463, 23 Atl. 115; Piedmont Wagon Co. v. Byrd, 119 N. C. 460, 26 S. E. 144; First Nat. Bank v. Clements, 87 Iowa, 542, 54 N. W. 197; Stoddard v. Thompson, 31 Iowa, 80; Richardson v. Watson, 23 Mo. 34; Richardson v. Jones, 16 Mo. 177; Shelton v. Brown, 22 La. Ann. 162; Aleix v. Derbigny, Id. 385; Markham v. O'Connor, 23 La. Ann. 688; State v. Spikes, 33 Ark. 801. Compare Dilley v. McGregor, 24 Kan. 361.

[420] Austin v. Hamilton County, 22 C. C. A. 128, 76 Fed. 208.

[421] China Mut. Ins. Co. v. Force, 142 N. Y. 90, 36 N. E. 874, 40 Am. St. Rep. 576; Treadwell v. Pitts, 64 Ark. 447, 43 S. W. 142.

[422] Wilson v. Trowbridge, 71 Iowa, 345, 32 N. W. 373; Guthrie v. Pierson (Tex. Civ. App.) 35 S. W. 405.

during its pendency and before the filing of the petition, has acquired possession of the property in litigation) must be treated as the commencement of a new suit; and such person must be brought in by process in accordance with the established practice, or he will not be concluded by a decree in favor of the petitioner.[423]

§ 577. Landlord and Tenant.

Although the case of landlord and tenant forms one of the typical examples of privity in estate, yet the authorities are by no means harmonious in regard to the proper application, to parties standing in that relation, of the principles of estoppel by judgment. In some of the states it is held that, where ejectment is brought against the tenant in possession, and he gives due and legal notice to his landlord, and the latter has an opportunity to come in and defend, the landlord is bound by the judgment against the tenant.[424] But in other jurisdictions the doctrine is that the lessor is not estopped or concluded by the judgment in a former action against his tenant, whereby the title was adjudged to be in the claimant, notwithstanding he was duly notified of the action, and even although he put his title in issue and defended it, unless he was made a party of record in that litigation.[425] The ground of this doctrine is that

[423] Hook v. Mercantile Trust Co., 36 C. C. A. 645, 95 Fed. 41.

[424] Chambers v. Lapsley, 7 Pa. 24; Ryerss v. Rippey, 25 Wend. (N. Y.) 432; Harvie v. Turner, 46 Mo. 444; Valentine v. Mahoney, 37 Cal. 389; Chant v. Reynolds, 49 Cal. 213; McCreery v. Everding, 54 Cal. 168; Van Alstine v. McCarty, 51 Barb. (N. Y.) 326; Hanson v. Armstrong, 22 Ill. 442; Thomsen v. McCormick, 136 Ill. 135, 26 N. E. 373; Clark v. Perdue, 40 W. Va. 300, 21 S. E. 735. See Goodman v. Hailes, 59 Ohio St. 342, 52 N. E. 829.

[425] Boles v. Smith, 5 Sneed (Tenn.) 105; Stout v. Taul, 71 Tex. 438, 9 S. W. 329; Orthwein v. Thomas (Ill.) 13 N. E. 564; Smith v. Gayle, 58 Ala. 600; Brush v. Cook, Brayton (Vt.) 89; Bennett v. Leach, 25 Hun (N. Y.) 178; Kent v. Lasley, 48 Wis. 257, 4 N. W. 23; Baxter v. Carrol (N. J. Ch.) 41 Atl. 407; Penfield v. Harris, 7 Tex. Civ. App. 659, 27 S. W. 762; Wilson v. State, 115 Ala. 129, 22 South. 567. In Samuel v. Dinkins, 12 Rich. Law (S. C.) 172, 75 Am. Dec. 729, it was said: "A tenant, as a privy in estate, will be concluded by the acts of his landlord prior to the lease, and by a recovery had against the landlord on grounds equivalent to such acts; but the landlord claims not under the tenant, and should not suffer for his default or weakness. When, as in this case, the tenant was assisted on the trial by the landlord, still if the landlord was no party on the record, it cannot appear from the recovery

the lessor does not claim through or under the lessee, and therefore is not, in that sense, his privy. But however this may be, it seems to be conceded that when an action is brought against a tenant by a stranger to recover possession of the premises, without notice to the landlord, and judgment is rendered for the stranger, the possession is adversely and completely changed by virtue of the judgment, and the landlord is so far bound by the judgment notwithstanding his want of notice, although he is not concluded as to the title or future right of possession.[426] A judgment and execution in an action of ejectment cannot affect a person in possession of the premises when the suit is commenced, unless he is made a defendant to the action; but if a tenant of the defendant in such action has taken possession with actual notice of the pendency of the action, he will be estopped by the judgment as though a party.[427]

In regard to actions brought by a tenant, it is held that the conclusiveness of the judgment, upon the points in issue, will inure equally to the benefit and protection of the landlord. Thus, for example, a judgment recovered by a tenant in an action against a trespasser, who justified under a void tax sale of the premises, is conclusive against the same defendant, on the question of the validity of the tax sale, when interposed in another action brought by the reversioner to recover for the injury to the inheritance.[428] But it does not follow that a recovery by or against the tenant will bar an action by the landlord upon the same acts or facts. For they may sue in respect to entirely distinct and individual rights. Thus,

against the tenant that the landlord had the full opportunity for defense which as a party he would have enjoyed. If it could, by extrinsic evidence, be shown that the landlord's efforts were in no way impeded, and that all the rights of offering testimony, cross-examining, and fairly presenting his title, were exercised by him, still he would not be concluded. His being a party might have caused change in the jury or in the admissibility of evidence, or in the conduct of parties or counsel, which would have altered the result."

[426] Stridde v. Saroni, 21 Wis. 173; Read v. Allen, 58 Tex. 380; Chant v. Reynolds, 49 Cal. 213; Sheets v. Joyner, 11 Ind. App. 205, 38 N. E. 830; Stanley v. Johnson, 113 Ala. 344, 21 South. 823; Redden v. Tefft, 48 Kan. 302, 29 Pac. 157.

[427] Fogarty v. Sparks, 22 Cal. 142; Bradley v. McDaniel, 48 N. C. 128.

[428] Freer v. Stolenbur, 2 Abb. Dec. (N. Y.) 189. Compare Wilson v. Brookshire, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792.

in a case in Massachusetts, it appeared that, in consequence of a leak in the main pipe of the defendant gas company, an explosion occurred, whereby damage was done to the plaintiff's house. In plaintiff's action against the company for negligence, defendant offered in evidence a judgment in its favor in an action formerly brought by plaintiff's tenant, who was in possession of the house at the time, in which the latter had claimed damages for injury to his person and property caused by the same explosion. But it was held that the plaintiff and his tenant were not in privity as respects this case, and consequently such former judgment was not evidence against the plaintiff. "The plaintiff's right to recover for the destruction of his building," said the court, "is entirely independent of the tenant's claim for the personal injury. The landlord does not claim by, through, or under his tenant. The former judgment therefore was not between the same parties or their privies, nor was the cause of action the same; no right or title to the demised premises was involved." [429]

§ 578. Principal and Agent.

Although, as a general principle, it is undoubtedly true that there is no privity of estate between principal and agent,[430] yet there are particular cases where a judgment for or against the one may be evidence for or against the other. Thus it is held that where, in replevin for goods in the hands of an agent, the defendant pleads property in his principal, and the plaintiff obtains a verdict, the principal is concluded from disputing the title of the plaintiff in a subsequent action against the principal, at least if the latter had notice of the first suit and an opportunity to defend.[431] So where the plaintiff sues the agent and is defeated, and then sues the principal, the latter may take advantage of the estoppel against the plaintiff.[432] But a judgment against a principal for damages caused by the negligence

[429] Bartlett v. Boston Gas Light Co., 122 Mass. 209.

[430] Groundie v. Northampton Water Co., 7 Pa. 233; Fogg v. Plumer, 17 N. H. 112; Phillips v. Jamieson, 51 Mich. 153, 16 N. W. 318.

[431] McKinzie v. Baltimore & O. R. Co., 28 Md. 161; Warfield v. Davis, 14 B. Mon. (Ky.) 40; Lippman v. Campbell, 40 Mo. App. 564; Guidry v. Jeanneaud, 25 La. Ann. 634. Compare Warner v. Comstock, 55 Mich. 615, 22 N. W. 64; McCallister v. Bridges (Ky.) 40 S. W. 70.

[432] Emma Silver Min. Co. v. Emma Min. Co. (C. C.) 7 Fed. 401.

of his agent, while it is evidence to show the quantum of damages in an action by the former against the latter to recover for the damages sustained by the principal, is not admissible to show that the alleged damages were attributable to the agent's negligence.[483] So an action by an agent for a conversion of property, in which the jury found the title to be in the principal and therefore gave the agent nominal damages, is no bar to an action by the principal.[484] But in a case where a cause of action against a carrier for negligence is of such a character that it may be prosecuted either by the owner of the property or by his agent, on account of an express contract between the agent and the carrier, a judgment in favor of the carrier, in a suit brought by the owner, is a bar to a subsequent suit brought by the agent.[485] A judgment for or against a public officer, in an action brought against him in his official capacity, is, as a general rule, conclusive on the municipal corporation which he represents and under which he serves, it being the real party in interest.[486] But the United States cannot be estopped by proceedings against its tenants or agents, and is not bound by judgments against its officers.[487]

§ 579. Master and Servant.

Where one appears in a suit and defends the same, upon an allegation that the defendant acted as his servant or agent in the transaction which forms the basis of the suit, or where he has a right and opportunity so to intervene, because the relation of master and servant does in reality exist, or where it is his duty to appear and assume the defense, in consequence of his implied obligation to save his servant harmless in the commission of the acts which he has directed, in either such case he is bound by the verdict and judg-

[483] Baynard v. Harrity, 1 Houst. (Del.) 200.

[484] Pico v. Webster, 12 Cal. 140.

[485] Green v. Clarke, 12 N. Y. 343.

[486] Ransom v. City of Pierre, 41 C. C. A. 585, 101 Fed. 665; Ashton v. City of Rochester, 133 N. Y. 187, 31 N. E. 334, 28 Am. St. Rep. 619; Bank of Kentucky v. Stone (C. C.) 88 Fed. 383; Town of Lyons v. Cooledge, 89 Ill. 529; Millikan v. City of La Fayette, 118 Ind. 323, 20 N. E. 847. Compare Town of Clay v. Hart, 25 Misc. Rep. 110, 55 N. Y. Supp. 43; People v. Zundel, 157 N. Y. 513, 52 N. E. 570.

[487] Carr v. United States, 98 U. S. 433, 25 L. Ed. 209.

ment, as being in privity with the nominal defendant.[438] Similarly, it is held that where a judgment has been rendered for the defendant in trespass against a master, this will bar a subsequent action against his servant for the same acts of trespass; because, it is argued, the servant would be allowed to show that he acted by the lawful command of his master, or that satisfaction had been obtained out of the master, and therefore, by analogy, he ought to be allowed to prove that a former suit against his master for the same acts was defeated on the merits.[439] But there is no privity between master and servant, such as to make a judgment against one binding on the other, where the subject of the litigation does not concern the employment, or the relation of employer and employé is not a feature of the case.[440] In the admiralty law, it is held that no privity (in this sense) exists between the master of a vessel and her owners.[441]

§ 580. Officer and Deputy.

There is in general no privity between an officer and his deputy. Thus a sheriff, having possession of property under a writ of attachment, is not bound by the judgment in a replevin suit to which he was not a party, and in which he was not served with process and did not appear, and which he did not defend, although his undersheriff was a party to the suit.[442] On the same principle, where one has brought trespass against a deputy sheriff for goods taken, and has recovered judgment, such judgment, though remaining unsatisfied, cannot be made the basis of an action against the sheriff. For the two cannot be considered joint trespassers, on their mere relation to each other, so as to subject them to a joint action, or to give the plaintiff a right to sue one on a judgment recovered against the

[438] Castle v. Noyes, 14 N. Y. 329.

[439] Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627. But compare Alexander v. Taylor, 4 Denio (N. Y.) 302.

[440] McCarty v. Lehigh Valley R. Co., 160 U. S. 110, 16 Sup. Ct. 240, 40 L. Ed. 358.

[441] Bailey v. Sundberg, 1 U. S. App. 101, 1 C. C. A. 387, 49 Fed. 583; Swett v. Black, 1 Spr. 574, Fed. Cas. No. 13,690; Gillingham v. Charleston Towboat & T. Co. (D. C.) 40 Fed. 649.

[442] Geekie v. Kirby Carpenter Co., 106 U. S. 379, 1 Sup. Ct. 315, 27 L. Ed. 157.

other.[443] And where, in an action against a sheriff for the negligence of his deputy, judgment is recovered against him by default, this judgment is not conclusive against the deputy in another action, brought on his official bond, but he may make any defense which the sheriff could have made in the first suit.[444] But a verdict and judgment for the defendant, in an action against a deputy sheriff, may be given in evidence by the sheriff, in a subsequent action against him for the same alleged act or default of the deputy.[445]

§ 581. Bailor and Bailee.

Either the general owner of property or a bailee having a special interest in it can maintain trover or case for an injury to it or conversion of it; and where the owner brings the action and there is judgment against him on the merits, it is a bar to a suit by the bailee.[446] And conversely, either the bailor or bailee having the right to maintain a suit against a stranger for injury to the goods, a recovery and satisfaction by either may be pleaded in bar of any subsequent suit by the other, for the damages or loss resulting from the same injury; although it is said that the suit by the general owner cannot be barred by a recovery and satisfaction by the bailee in a suit commenced after the suit by the general owner.[447] A judgment determining that the property involved belongs to the plaintiff is conclusive on a warehouseman with whom plaintiff's adversary has stored it, and cannot be contradicted in an action to recover the possession of the property.[448]

[443] Campbell v. Phelps, 1 Pick. (Mass.) 62, 11 Am. Dec. 139. But compare Morgan v. Chester, 4 Conn. 387.

[444] Wilkins v. Dingley, 29 Me. 73.

[445] King v. Chase, 15 N. H. 9, 41 Am. Dec. 675.

[446] Green v. Clarke, 12 N. Y. 343. But it is said that a judgment in replevin against the bailee of an article is not conclusive on the bailor. Standard Foundry Co. v. Schloss, 43 Mo. App. 304.

[447] The Farmer v. McCraw, 26 Ala. 189, 62 Am. Dec. 718; Id., 31 Ala. 659; Chesley v. St. Clair, 1 N. H. 189; Bissell v. Huntington, 2 N. H. 142. See Story, Bailm. § 94.

[448] Hughes v. United Pipe Lines, 119 N. Y. 423, 23 N. E. 1042.

§ 582. Successors in Office.

According to the generally accepted doctrine, the incumbent of an office stands in a relation of privity with his predecessor in the same office; that is, they are connected by successive relationship to the same rights of property. Consequently the incumbent is concluded by a judgment for or against his predecessor in any suit touching the powers or privileges of the office.[449] And if the title to the office is controverted, the decision will of course be conclusive upon any person claiming under the contestant.

§ 583. Corporation and Stockholders.

Where proceedings are taken, under a statute, to enforce upon the stockholders of a corporation a personal liability for its debts, or to force the payment of a balance due on their subscriptions for the stock, what effect is to be given, as evidence, to a judgment previously recovered against the corporation? In Massachusetts, by a long and uniform course of decisions, it has been settled that such judgment is final and conclusive evidence; that it estops the stockholders from denying the existence or validity of the original claim; and that the merits of the judgment cannot be inquired into.[450] "Every member of a corporation is so far privy in interest in a suit against the corporation that he is bound by a judgment against it."[451] This doctrine has also the sanction of the United States supreme court and the other federal courts;[452] and is approved and

[449] Brounker v. Atkyns, Skin. 15; City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; Vance v. Wesley, 29 C. C. A. 63, 85 Fed. 157; Holsworth v. O'Chander, 49 Neb. 42, 68 N. W. 334; State v. Kennedy, 60 Neb. 300, 83 N. W. 87. Compare Greenleaf v. Board of Com'rs of Pasquotank County, 123 N. C. 30, 31 S. E. 264.

[450] Inhabitants of Brewer v. Inhabitants of New Gloucester, 14 Mass. 216; Gaskill v. Dudley, 6 Metc. 546, 39 Am. Dec. 750; Lane v. Inhabitants of Fourth School District, 10 Metc. 462; Holyoke Bank v. Goodman Paper Manuf'g. Co., 9 Cush. 576; Farnum v. Ballard Vale Machine Shop, 12 Cush. 507; Johnson v. Somerville Dyeing & Bleaching Co., 15 Gray, 216; Hawes v. Anglo-Saxon Petroleum Co., 101 Mass. 385; Thayer v. New England Lithographic Steam Printing Co., 108 Mass. 523.

[451] Gaskill v. Dudley, 6 Metc. 546, 39 Am. Dec. 750.

[452] Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739, 33 L. Ed. 184; Wilson

accepted in many of the states,[453] as well as in England.[454] A recent text-writer has placed the rule upon a basis of reasoning which appears impregnable, in the following language: "A judgment obtained against the corporation is certainly conclusive (until reversed for error or impeached for fraud) in a suit to charge the stockholders upon their unpaid subscriptions; and by analogy it should also be held conclusive in a suit to charge them upon their additional individual liability to creditors. It must be borne in mind that a corporation is composed of its stockholders, and that a judgment obtained against the corporation is in reality a judgment obtained against the stockholders in their corporate capacity. There is no reason why the members of a corporation should be allowed to contest a creditor's claim twice,—once in a suit against the corporation through the corporate agents, and again in a suit brought to charge them individually. If the judgment against the corporation was obtained by fraud or through collusion with the company's agents, the stockholders may obtain relief through equitable proceedings."[455] There are, however, certain qualifications upon the application of this rule. In the first place, it seems that the organization and existence of the corporation must be proved as an independent fact

v. Seymour, 22 C. C. A. 477, 76 Fed. 678; Hendrickson v. Bradley, 29 C. C. A. 303, 85 Fed. 508; James v. Central Trust Co., 39 C. C. A. 126, 98 Fed. 489; National Foundry & Pipe Works v. Oconto Water Co. (D. C.) 68 Fed. 1006.

[453] Came v. Brigham, 39 Me. 35; Milliken v. Whitehouse, 49 Me. 529; Merrill v. President, etc., of Suffolk Bank, 31 Me. 57, 1 Am. Rep. 649; Barron v. Paine, 83 Me. 312, 22 Atl. 218; Willoughby v. Chicago Junction R. & U. S. Co., 50 N. J. Eq. 656, 25 Atl. 277; Wilson v. Stockholders of Pittsburgh & Youghiogheny Coal Co., 43 Pa. 424; Castleman v. Templeman, 87 Md. 546, 40 Atl. 275, 41 L. R. A. 367, 67 Am. St. Rep. 363; Heggie v. People's Building & Loan Ass'n, 107 N. C. 581, 12 S. E. 275; Cole v. Adams, 19 Tex. Civ. App. 507, 49 S. W. 1052; Calloway v. Glenn (Ky.) 49 S. W. 440; Ball v. Reese, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638; Hatfield v. Cummings, 152 Ind. 537, 53 N. E. 761; Singer v. Hutchinson, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133; Schertz v. First Nat. Bank, 47 Ill. App. 124; Donworth v. Coolbaugh, 5 Iowa, 300; Nichols v. Stevens, 123 Mo. 96, 25 S. W. 578, 45 Am. St. Rep. 514; Holland v. Duluth Iron Min. & Development Co., 65 Minn. 324, 68 N. W. 50, 60 Am. St. Rep. 480; Welch v. Sargent, 127 Cal. 72, 59 Pac. 319.

[454] Bank of Australasia v. Nias, 16 Q. B. 717.

[455] Mor. Priv. Corp. § 619.

in the suit against the stockholders; that matter is not conclusively established by the first judgment.[456] In the second place, if the statute only provides that the stockholders shall be personally liable for a specified class of debts or to a specified class of creditors, it may be permissible to inquire, independently of the judgment, whether the original claim belonged to the class contemplated by the law.[457] But stockholders thus sued upon a judgment recovered against the corporation will not be permitted to show that the indebtedness for which the judgment was recovered arose upon a contract which was ultra vires; for that is a defense which the corporation might have interposed in the original suit.[458] On the other hand, it is always open to a stockholder, as a means of avoiding the personal liability sought to be fixed upon him, to show that the judgment against the corporation was procured through fraud and collusion.[459]

In some few of the states a modified form of the above rule is in force. In those jurisdictions, it is considered that a judgment against the corporation is prima facie evidence of indebtedness in an action against the stockholders, and can be questioned only on the ground of fraud or mistake; the stockholders not being mere sureties for the corporation, but primarily and jointly liable with it. "It is not strictly res judicata against the stockholders, but such strong evidence of the indebtedness that it can only be questioned on the

[456] Hudson v. Carman, 41 Me. 84.

[457] Wilson v. Stockholders of Pittsburgh & Youghiogheny Coal Co., 43 Pa. 424; Conant v. Van Schaick, 24 Barb. (N. Y.) 87; Larrabee v. Baldwin, 35 Cal. 155.

[458] Singer v. Hutchinson, 183 Ill. 606, 56 N. E. 388, 75 Am. St. Rep. 133; Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, 29 Am. St. Rep. 158. But in Kansas, where it is settled law that a corporation which has received the benefit of a contract is estopped to contest it on the ground that it is ultra vires, it is held that a judgment against a corporation is not conclusive on a stockholder in an action to charge him with individual liability, in such sense as to preclude him from showing the nature of the original claim, and that the contract sued on was ultra vires, and hence not of the class for which he is liable. Ward v. Joslin, 44 C. C. A. 456, 105 Fed. 224.

[459] James v. Central Trust Co., 39 C. C. A. 126, 98 Fed. 489; Barron v. Paine, 83 Me. 312, 22 Atl. 218; Heggie v. People's Building & Loan Ass'n, 107 N. C. 581, 12 S. E. 275; Ball v. Reese, 58 Kan. 614, 50 Pac. 875, 62 Am. St. Rep. 638; Schertz v. First Nat. Bank, 47 Ill. App. 124; Wilson v. Kiesel, 9 Utah, 397, 35 Pac. 488.

ground of fraud or mistake."[460] If this means that the judgment is conclusive on the merits (though open to the imputation of fraud), it is practically equivalent to the rule as elsewhere held. Otherwise the position is certainly untenable. For, on well known principles, a judgment is either conclusive evidence or it is not admissible at all. It cannot be "strong" or persuasive evidence.

In the state of New York this matter has long been a vexed question. For fifty years the course of the decisions exhibits the utmost confusion, vacillation, and uncertainty. It would be tedious and unprofitable to review the cases at this point, but they are all collected in the foot-note, to which we refer the reader who may have occasion to inquire further into the law of that state.[461] The final result appears to be that, in that jurisdiction, the judgment is not conclusive and not even prima facie evidence against the stockholders,[462]—a conclusion which is equally opposed to the almost universal opinion elsewhere and to sound legal reason.

The liability of a stockholder for the debt of the corporation is extinguished by the recovery of a judgment thereon against the corporation, if he was not summoned to appear in the suit and ceased to be a stockholder before the recovery of the judgment.[463] So a stockholder in an insolvent insurance company is not liable to an action on an assessment made on his stock-notes by the court in a proceeding by the creditors against the company in which a receiver was appointed, on the petition of the receiver and creditors, where he was not made a party to such proceeding.[464] But a pledgee of

[460] Merchants' Bank v. Chandler, 19 Wis. 434; Grund v. Tucker, 5 Kan. 70; Berger v. Williams, 4 McLean, 577, Fed. Cas. No. 1,341.

[461] Slee v. Bloom, 20 Johns. 669; Moss v. Oakley, 2 Hill, 265; Moss v. McCullough, 5 Hill, 131; Id., 7 Barb. 279; Hoagland v. Bell, 36 Barb. 57; Miller v. White, 59 Barb. 434; Hall v. Sigel, 13 Abb. Prac. (N. S.) 178; Lowry v. Inman, 46 N. Y. 119; Belmont v. Coleman, 21 N. Y. 96; Conkling v. Furman, 8 Abb. Prac. (N. S.) 161; Strong v. Wheaton, 38 Barb. 616; Wheeler v. Miller, 24 Hun, 541; Miller v. White, 50 N. Y. 137; McMahon v. Macy, 51 N. Y. 155; Stephens v. Fox, 83 N. Y. 313.

[462] McMahon v. Macy, 51 N. Y. 155; Torbett v. Godwin, 62 Hun, 407, 17 N. Y. Supp. 46; Wetter v. Lewis, 22 Misc. Rep. 122, 48 N. Y. Supp. 617.

[463] Handrahan v. Cheshire Iron Works, 4 Allen (Mass.) 396.

[464] Lamar Ins. Co. v. Gulick, 102 Ill. 41. See Stewart v. Marion Trust Co., 155 Ind. 174, 57 N. E. 911.

stock of a corporation to secure a debt of the stockholder is a stockholder, and not a creditor, of the corporation, and is therefore bound by a judgment for a debt against the corporation.[465] The fact that a general receiver for the corporation, who was made defendant and served with process in the action against the corporation, suffered a default, will not affect the conclusive character of the adjudication.[466] But it must be observed that, in respect to all rights arising out of contracts other than subscriptions for stock, a shareholder is not bound by a judgment or judicial proceeding against the corporation to which he was not a party.[467]

§ 583a. Corporation and Bondholders.

There is in general no privity between a corporation and the holders of its bonds. The latter, though creditors of the company, are not members of it, and are not represented by it in suits in which it is a party, in such sense as to be bound by the judgment rendered.[468] For example, a judgment against a railroad company is not binding on its bondholders or mortgage trustees who were not parties thereto, and they may relitigate the plaintiff's right to recover, as well as the amount of the recovery, when it is sought to establish such judgment as a lien superior to the mortgage.[469] But a bondholder who intervenes in litigation against the corporation, and so makes himself a party, will of course be bound by the result of the suit.[470] And bondholders of a corporation whose bonds are secured by a mortgage or deed of trust are represented by the trustee in any litigation involving the validity of the mortgage or its foreclosure, and will be concluded by the decree, though not formally made parties.[471] The same rules hold good in regard to

[465] Farmers' Bank v. Ohio River Line Steamboat Co. (Ky.) 56 S. W. 719.

[466] Hale v. Hardon, 37 C. C. A. 240, 95 Fed. 747.

[467] Andrews v. National Foundry & Pipe Works, 22 C. C. A. 110, 76 Fed. 166, 36 L. R. A. 139.

[468] Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; Central Trust Co. v. Condon, 14 C. C. A. 314, 67 Fed. 84; State v. Board of Com'rs of Wichita County, 59 Kan. 512, 53 Pac. 526.

[469] Central Trust Co. v. Hennen, 33 C. C. A. 189, 90 Fed. 593.

[470] First Nat. Bank v. Ewing, 43 C. C. A. 150, 103 Fed. 168.

[471] Woods v. Woodson, 40 C. C. A. 525, 100 Fed. 515; Pollitz v. Farmers' Loan & T. Co. (C. C.) 53 Fed. 210.

the holders of municipal bonds. For instance, such holders, if not made parties to a suit brought by tax-payers to enjoin the proper officers from levying and collecting a tax to pay them, are in no manner affected by a judgment granting the injunction.[472]

§ 584. Municipal Corporation and Tax-Payers.

"A judgment against a county or its legal representatives, in a matter of general interest to all the people thereof, as one respecting the levy and collection of a tax, is binding not only on the official representatives of the county named in the proceeding as defendants, but upon all the citizens thereof though not made parties defendant by name. This, we think, is so both on principle and authority; for, in suits of the character mentioned, the legally constituted representatives of the county stand in the place of each citizen of the county who is liable to be called on as a tax-payer to contribute his proper proportion to liquidate the demand which a judgment may establish." [473] Thus, where a county issued bonds in aid of a railroad, and a suit was brought, by certain citizens and tax-payers of the county, against the officers of the county, to enjoin the issue of the bonds and declare them invalid, and judgment was given against the validity of the bonds, such judgment is conclusive in a suit against the county by any holder of the bonds who took with notice of the pendency of the former suit.[474] And conversely, a judgment upon the merits dismissing an action brought by certain tax-payers of a county against the county commissioners, to enjoin the issue of railroad aid bonds, is an estoppel to a subsequent action, after the bonds have been issued, brought in the name of the

[472] Chilton v. Town of Gratton (C. C.) 82 Fed. 873; Coler v. Com'rs of Stanly County (C. C.) 89 Fed. 257. And see City of New Orleans v. Warner, 175 U. S. 120, 20 Sup. Ct. 44, 44 L. Ed. 96.

[473] State v. Rainey, 74 Mo. 229; Clark v. Wolf, 29 Iowa, 197; Sauls v. Freeman, 24 Fla. 209, 4 South. 525, 12 Am. St. Rep. 190; Bear v. Com'rs of Brunswick County, 122 N. C. 434, 29 S. E. 719, 65 Am. St. Rep. 711; Taxpayers v. O'Kelley, 49 La. Ann. 1039, 22 South. 311; Cannon v. Nelson, 83 Iowa, 242, 48 N. W. 1033.

[474] Scotland County v. Hill, 112 U. S. 183, 5 Sup. Ct. 93, 28 L. Ed. 692. Compare Atchison, T. & S. F. R. Co. v. Com'rs of Jefferson County, 12 Kan. 127. And see Laird v. City of De Soto (C. C.) 22 Fed. 421.

state upon the relation of certain other tax-payers of the same county, against the commissioners, the railroad, and purchasers of the bonds, to have the bonds adjudged illegal and void.[475] But it is held that a judgment in favor of A., setting aside an assessment for a local improvement, binds only the parties to the suit in which it was rendered, and does not prevent B. from maintaining an action to restrain the collection of the same assessment.[476] And so a previous judgment declaring the assessment under which a tax sale was made absolutely void, is not binding on the purchaser at such sale, if he was not a party to the suit in which the judgment was rendered.[477]

In general, also, where the litigation concerns public property, a judgment for or against the municipality will bind the property-owners and tax-payers. Thus, a decree adjudicating the rights of a village in a highway is binding on parties claiming rights therein under a subsequent ordinance of the village.[478] So, where, in an action of trespass against a village, the defendant justifies by pleading title in itself by virtue of a dedication to the public, a judgment against it is conclusive against the right of any property holder to assert that the land is a public square.[479] But in Indiana, it is said that a judgment in an action wherein the commissioners of a county are plaintiffs is not a bar to another action based on the same facts, but brought by a tax-payer as plaintiff.[480] And it seems that, in mandamus on the relation of a county attorney to compel the county officers to hold their offices at a certain place as the permanent county-seat, a judgment in a suit by electors and tax-payers that said place was not the county-seat is not conclusive.[481]

[475] State v. Chester & L. N. G. R. Co., 13 S. C. 290; Harmon v. Auditor of Public Accounts, 123 Ill. 122, 13 N. E. 161, 5 Am. St. Rep. 502.

[476] Zink v. City of Buffalo, 6 Hun (N. Y.) 611; Loesnitz v. Seelinger, 127 Ind. 422, 25 N. E. 1037.

[477] State v. Batt, 40 La. Ann. 582, 4 South. 495.

[478] O'Connell v. Chicago Terminal Transfer R. Co., 184 Ill. 308, 56 N. E. 355. Compare James v. City of Louisville (Ky.) 40 S. W. 912.

[479] Elson v. Comstock, 150 Ill. 303, 37 N. E. 207. And see Xiques v. Bujac, 7 La. Ann. 498.

[480] Price v. Gwin, 144 Ind. 105, 43 N. E. 5.

[481] State v. Stock, 38 Kan. 154, 16 Pac. 106; State v. Burton, 47 Kan. 44, 27 Pac. 141.

§ 585. Trustee and Cestui Que Trust.

The general rule is, that in all proceedings affecting the trust estate, whether brought by or against third persons, the trustee and cestui que trust are so far independent of each other that the latter must be made a party to the suit in order to be bound by the judgment or decree rendered therein.[482] But some of the decisions hold that a suit prosecuted or defended in good faith by a trustee for the beneficiaries, with their knowledge and consent,[483] or more particularly, at their request,[484] will be conclusive upon them in its result. Whether, in an action to redeem or to foreclose a mortgage of the trust estate, or to enforce a debt of the trust which is specifically chargeable upon, or payable out of, particular property, it is necessary that all the cestuis que trustent should be joined as parties, is not fully settled. The English cases apply the general rule in this instance.[485] But the majority of the American cases hold that, in such cases, the trustee may represent the beneficiaries, and the latter will be bound by the decree in the absence of fraud.[486]

[482] Bifield v. Taylor, 1 Moll. 198; Adams v. St. Leger, 1 Ball. & B. 184; Morse v. Sadler, 1 Cox Ch. 352; Calverley v. Phelp, 6 Madd. 229; Caldwell v. Taggart, 4 Pet. 190, 202, 7 L. Ed. 828; Platt v. Oliver, 2 McLean, 267, Fed. Cas. No. 11,115; Collins v. Hydorn, 135 N. Y. 320, 32 N. E. 69; Fish v. Howland, 1 Paige (N. Y.) 20; Schenck v. Ellingwood, 3 Edw. Ch. (N. Y.) 175; Whelan v. Whelan, 3 Cow. 537; Williams v. Tozer, 185 Pa. 302, 39 Atl. 947, 64 Am. St. Rep. 650; Stillwell v. McNeely, 2 N. J. Eq. 305; Dunn v. Seymour, 11 N. J. Eq. 220; Collins v. Lofftus, 10 Leigh (Va.) 5, 34 Am. Dec. 719; Mebane v. Mebane, 66 N. C. 334; Sprague v. Tyson, 44 Ala. 338; Lebeck v. Ft. Payne Bank, 115 Ala. 447, 22 South. 75, 67 Am. St. Rep. 51; Helm v. Hardin, 2 B. Mon. (Ky.) 231; Evangelical Synod v. Schoeneich, 143 Mo. 652, 45 S. W. 647. In New York, the Code Civ. Proc. § 449, authorizes the trustee of an express trust to sue without joining the beneficiary.

[483] Hornsby v. City Nat. Bank (Tenn.) 60 S. W. 160.

[484] Bracken v. Atlantic Trust Co., 36 App. Div. 67, 55 N. Y. Supp. 506.

[485] Henley v. Stone, 3 Beav. 355; Lowe v. Morgan, 1 Bro. Ch. 368; Palmer v. Carlisle, 1 Sim. & S. 423; Calverley v. Phelp, 6 Madd. 229; Thomas v. Dunning, 5 De Gex & S. 618.

[486] Manson v. Duncanson, 166 U. S. 533, 17 Sup. Ct. 647, 41 L. Ed. 1105; Van Vechten v. Terry, 2 Johns. Ch. 197; Tauziede v. Jumel, 60 Hun, 583, 15 N. Y. Supp. 24; New Jersey Franklinite Co. v. Ames, 12 N. J. Eq. 507; Willink v. Morris Canal & Banking Co., 4 N. J. Eq. 377; Johnson v. Robertson, 31 Md. 476; Henderson v. Williams, 97 Ga. 709, 25 S. E. 395; Clark v. Flan-

But when suit is brought against a trustee, seeking to charge the trust estate with a debt for which the trustee is only personally liable, this fact being known to the plaintiff, a judgment rendered therein against the trustee is not conclusive on the beneficiaries, unless the latter, being sui juris, were parties to the suit or consented to the judgment.[487] An exception to the general rule exists in cases where the cestuis que trustent are so numerous that it would be impossible or extremely inconvenient to bring them all before the court. Under such circumstances, they need not all be made parties to the suit, but if a sufficient number join in the action, and a reasonable constructive notice be given to the others, the latter are considered as virtually represented in the proceedings, and are therefore bound by the final adjudication.[488] But a few of the beneficiaries cannot be allowed to represent the rest, unless there is one general right in all, i. e., unless their beneficial interests are entirely homogeneous; otherwise they must all be made parties in order to be bound.[489]

§ 585a. Assignees and Receivers.

It is generally considered that a receiver and the person or corporation whose property is under his charge are so far in privity that a judgment for or against the latter will be conclusive on the former.[490] So also, a judgment on a note, against the maker there-

nery, 99 Ga. 239, 25 S. E. 312; Wegman Piano Co. v. Irvine, 107 Ga. 65, 32 S. E. 898, 73 Am. St. Rep. 109; Robertson v. Van Cleave, 129 Ind. 217, 26 N. E. 899, 15 L. R. A. 68. Compare Coe v. Ritter, 86 Mo. 277; Chambers v. Prewitt, 172 Ill. 615, 50 N. E. 145.

[487] Snelling v. American Freehold Land Mortg. Co., 107 Ga. 852, 33 S. E. 634, 73 Am. St. Rep. 160.

[488] Platt v. Oliver, 2 McLean, 267, Fed. Cas. No. 11,115; Franklin Savings Bank v. Taylor, 9 U. S. App. 406, 4 C. C. A. 55, 53 Fed. 854; Kerr v. Blodgett, 48 N. Y. 62; Van Vechten v. Terry, 2 Johns. Ch. (N. Y.) 197; Egberts v. Wood, 3 Paige (N. Y.) 517, 24 Am. Dec. 236; Thompson v. Brown, 4 Johns. Ch. (N. Y.) 619; Willink v. Morris Canal & Banking Co., 4 N. J. Eq. 377; Shaw v. Norfolk County R. Co., 5 Gray (Mass.) 170.

[489] Evans v. Stokes, 1 Keen, 24; Newton v. Egmont, 4 Sim. 574; Richardson v. Larpent, 2 Younge & C. Ch. 507; Long v. Yonge, 2 Sim. 385; Bainbridge v. Burton, 2 Beav. 539.

[490] See Stearns v. Lawrence, 28 C. C. A. 66, 83 Fed. 738; United States Exp. Co. v. Smith, 35 Ill. App. 90. Compare Abbey v. International & G. N. R. Co.'s Receivers, 5 Tex. Civ. App. 261, 23 S. W. 934.

of, is conclusive against his general assignee for the benefit of creditors, as establishing both the relation of debtor and creditor and fixing the amount of the debt.[491] But an assignee in insolvency represents the creditors rather than the insolvent, although it is held that they are not privies in law to such an extent that a creditor will be bound by all the findings of the court in a suit between the assignee and another creditor as to the validity of the latter's claim against the estate.[492] But in Alabama, it is said that where an assignee replevies property attached by certain creditors, and judgment goes against him, the judgment is conclusive against the beneficiaries of his trust.[493] On similar principles, a trustee in bankruptcy who procures himself to be substituted for the bankrupt in a pending action begun by the latter, and prosecutes the suit to final judgment, will be bound by the result, and cannot reopen the questions adjudicated, by any subsequent proceeding in the court of bankruptcy.[494] So where an assignee in insolvency or a trustee in bankruptcy brings suit to set aside an alleged fraudulent conveyance by the bankrupt or insolvent, the latter being a party, the judgment in such action will be conclusive against the bankrupt or insolvent (or conclusive in his favor, as the case may be), when the same alleged act of fraud is set up by the creditors as a ground of opposition to his discharge.[495]

§ 586. Principal and Surety.

According to the civil law, the obligation of a surety being dependent upon that of the principal, the surety is regarded as identified with the principal, in respect to whatever is decided for or against him. And hence if the demand against the principal has been dismissed (upon grounds not personal to himself), the surety, in case he is afterwards sued, may oppose the exceptio rei judicatæ

[491] Merchants' Nat. Bank v. Hagemeyer, 4 App. Div. 52, 38 N. Y. Supp. 626. Compare Sweetser v. Davis, 26 App. Div. 398, 49 N. Y. Supp. 874.

[492] Farrel v. National Shoe & Leather Bank (C. C.) 43 Fed. 123. Compare Farrell Foundry & Mach. Co. v. Preston Nat. Bank, 93 Mich. 582, 53 N. W. 831.

[493] Frank v. Myers, 97 Ala. 437, 11 South. 832.

[494] In re Van Alstyne (D. C.) 100 Fed. 929.

[495] In re Skinner (D. C.) 97 Fed. 190; In re Baird, 84 Cal. 95, 24 Pac. 167.

to the creditor. And conversely, when the judgment is against the principal, the creditor may avail himself of the same exception as against the surety.[496] And this view of the conclusiveness of the judgment upon the surety has been adopted in some of our own courts in cases where the surety, though not a party to the suit, had notice of the proceedings.[497] But the general tendency of the English and American jurisprudence is to hold, in ordinary cases of suretyship, that a judgment against the principal is not conclusive upon the surety, unless the latter was made a defendant to the action.[498] Thus, although a judgment is rendered against the estate of the deceased maker of a promissory note in such form as to show that the claim was presented to the court within two years from the grant of administration, it is held that a surety on the note, not a party to the judgment, may show that the claim was not in fact so presented.[499] And in New York, the authorities even go so far as to hold that a mere surety for a debt will not be bound by a judgment against his principal, even though the suit was conducted, on the part of the principal, exclusively by the surety as his agent.[500] But still there are many cases which sustain the doctrine that the judgment against the principal is at least prima facie evidence against the surety, though liable to be impeached for fraud, collusion, mistake, or payment.[501] On the whole, the best rule which can be deduced from the authorities is, that the judgment is conclusive upon

[496] 1 Evans' Poth. Obl. p. 562. See the French law followed and applied, in this respect, in Brush v. Wilson, 2 L. C. R. 249.

[497] Stoops v. Wittler, 1 Mo. App. 420; McFall v. Dempsey, 43 Mo. App. 369; Oberbeck v. Mayer, 59 Mo. App. 289.

[498] King v. Norman, 4 C. B. 884; United States v. Ingate (C. C.) 48 Fed. 251; Douglass v. Howland, 24 Wend. 35; Beall v. Beck, 3 Har. & McH. (Md.) 242; McKellar v. Bowell, 11 N. C. 34; Lartigue v. Baldwin, 5 Mart. O. S. (La.) 193; Browne v. French, 3 Tex. Civ. App. 445, 22 S. W. 581; Phœnix Mut. Life Ins. Co. v. Landis, 50 Mo. App. 116; Stevens v. Pendleton, 83 Mich. 342, 47 N. W. 1097; American Building & L. Ass'n v. Stoneman, 53 Minn. 212, 54 N. W. 1115.

[499] Curry v. Mack, 90 Ill. 606.

[500] Jackson v. Griswold, 4 Hill (N. Y.) 522; Moss v. McCullough, 5 Hill (N. Y.) 131.

[501] Moses v. United States, 166 U. S. 571, 17 Sup. Ct. 682, 41 L. Ed. 1119; Drummond v. Prestman, 12 Wheat. 515, 6 L. Ed. 712; Berger v. Williams, 4 McLean, 577, Fed. Cas. No. 1,341; Union Guaranty & Trust Co. v. Robinson,

the surety only in cases where the principal may be considered as the former's agent in the particular transaction, and where, upon a fair construction of the contract of indemnity, it may be construed as binding the surety to a responsibility for the conduct or result of the suit in which the judgment is rendered; otherwise the judgment proves only the fact of its own existence.[502] For the purpose of our further discussion of this subject it will be convenient to divide the different varieties of suretyship into a few leading classes. And we proceed next to consider the case of sureties on bonds or undertakings required as a part of the practice of the courts.

§ 587. Sureties on Bonds given in the Course of Legal Proceedings.

As already remarked, where the obligation of the surety is simply to pay money if the principal fails to do so, there is no such privity between them as will make a judgment against the principal evidence against the surety. But the case is different with regard to sureties on bonds given in the course of a suit or other proceeding; for in the latter instance the surety submits himself to the acts of the principal and to the judgment, as itself a legal consequence, falling within the suretyship.[503] On this principle, a judgment against a de-

24 C. C. A. 650, 79 Fed. 420; Howgate v. United States, 3 App. D. C. 277; Respublica v. Davis, 3 Yeates (Pa.) 128, 2 Am. Dec. 366; State v. Banks (Md.) 24 Atl. 540; Bradwell v. Spencer, 16 Ga. 578; Haddock v. Perham, 70 Ga. 572; Jacobs v. Hill (Va.) 2 Leigh, 393; Munford v. Overseers of Poor of Nottoway, 2 Rand. (Va.) 313; Baker v. Preston, 1 Gilmer (Va.) 235; Moulding v. Wilhartz, 169 Ill. 422, 48 N. E. 189; Knickerbocker v. Wilcox, 83 Mich. 200, 47 N. W. 123, 21 Am. St. Rep. 595.

[502] Drummond v. Prestman, 12 Wheat. 515, 6 L. Ed. 712; Stovall v. Banks, 10 Wall. 583, 19 L. Ed. 1036; Towle v. Towle, 46 N. H. 432; Parkhurst v. Sumner, 23 Vt. 538, 56 Am. Dec. 94; Way v. Lewis, 115 Mass. 26; State v. Nutter, 44 W. Va. 385, 30 S. E. 67.

[503] Giltinan v. Strong, 64 Pa. 242. Compare Macready v. Schenck, 41 La. Ann. 456, 6 South. 517. See Pasewalk v. Bollman, 29 Neb. 519, 45 N. W. 780, 26 Am. St. Rep. 399. It is competent for the legislature to enact that the appellate court, in case of affirmance of the judgment below, shall enter judgment not only against the appellant, but also against the sureties on his appeal bond. Such a law is not unconstitutional. See Beall v. New Mexico, 16 Wall. 535, 21 L. Ed. 292; Meredith v. Santa Clara Mining Ass'n, 60 Cal. 617; White v. Prigmore, 29 Ark. 208; Shannon v. Dodge, 18 Colo. 164, 32 Pac. 61; Hanna v. Savage, 7 Wash. 414, 35 Pac. 127.

fendant is conclusive upon his bail, to the extent that it will preclude them from questioning its merits or its amount, or alleging that it would not have been rendered but for the fault or negligence of the principal, although they may show fraud or collusion.[504] But in an action against the surety on a recognizance for the good behavior of the principal, a verdict and judgment in a civil suit on the same recognizance against the principal, in favor of the state, is not admissible in evidence.[505] So a surety on a claim-bond is sufficiently a party to the claim-case to be bound by the verdict and judgment therein for damages and costs.[506] And so a judgment in favor of the plaintiff in replevin is conclusive upon the defendant's sureties in the redelivery bond, so that, in an action against them on the bond, they cannot set up any defense which could with reasonable diligence have been interposed in the replevin action.[507] And a judgment against a surety in a replevin bond is prima facie evidence of the measure of damages to which the surety is entitled against his principal.[508] Again, the sureties on an injunction bond are conclusively bound by the decree against their principal.[509] And the same is true of the sureties on a bond to secure the payment of costs in the action.[510] So also, the order on the settlement of a receiver as to the amount due by him on account of his receivership is binding on his sureties;[511] and a judgment against an assignee for the benefit

[504] Parkhurst v. Sumner, 23 Vt. 538, 56 Am. Dec. 94; Way v. Lewis, 115 Mass. 26, citing Heard v. Lodge, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; Tracy v. Goodwin, 5 Allen (Mass.) 409; Tracy v. Maloney, 105 Mass. 90; Cutter v. Evans, 115 Mass. 27. See, also, Riddle v. Baker, 13 Cal. 295; Keane v. Fisher, 10 La. Ann. 261.

[505] Respublica v. Davis, 3 Yeates (Pa.) 128, 2 Am. Dec. 366.

[506] Harvey v. Head, 68 Ga. 247.

[507] Boyd v. Huffaker, 40 Kan. 634, 20 Pac. 459; Craig v. Herring, 80 Ga. 709, 6 S. E. 283; Thomson v. Joplin, 12 S. C. 580; Cheatham v. Morrison, 37 S. C. 187, 15 S. E. 924; Richardson v. People's Nat. Bank, 57 Ohio St. 299, 48 N. E. 1100; Schott v. Youree, 142 Ill. 233, 31 N. E. 591.

[508] Lyon v. Northrup, 17 Iowa, 314.

[509] Towle v. Towle, 46 N. H. 431; Methodist Churches of N. Y. v. Barker, 18 N. Y. 463; Jones v. Mastin, 1 Mo. App. Rep'r, 251, 60 Mo. App. 578; Shenandoah Nat. Bank v. Read, 86 Iowa, 136, 53 N. W. 96.

[510] Washburn v. Pullman's Palace-Car Co., 21 C. C. A. 598, 76 Fed. 1005; McClaskey v. Barr (C. C.) 79 Fed. 408.

[511] Clark v. First Nat. Bank, 57 Mo. App. 277.

of creditors is prima facie evidence against the sureties on his bond.[512] In the absence of fraud or collusion, a judgment against the defendant in an action is conclusive evidence of the debt both against him and a surety on a bond to dissolve an attachment.[513] Again, the sureties on a bond to perform a decree are bound by a decree which is binding on their principal, in the absence of collusion.[514] Sureties on a guardian's bond for the sale of real estate are concluded by the order of the court on the guardian's accounting, as to the amount due from him to the ward, where the guardian was duly cited and the sureties appeared at the hearing, and probably the result would be the same without such appearance on their part.[515]

§ 588. Sureties of Sheriffs and Constables.

Upon the question of the effect to be given to a judgment against a sheriff or constable recovered by a person injured by his wrongful act or negligence, as evidence in a subsequent action against the sureties on the official bond, the authorities are much divided. It is held in some of the cases that such judgment will not be evidence of any fact which it was necessary to find in order to warrant the judgment, if the sureties were not joined as parties in the action.[516] But it is maintained by some of the other authorities that the judgment is entitled to be received as prima facie evidence against the sureties.[517] In one of the cases cited it was said: "The con-

[512] Pierpoint v. McGuire, 13 Misc. Rep. 70, 34 N. Y. Supp. 150.

[513] Cutter v. Evans, 115 Mass. 27; Tapley v. Goodsell, 122 Mass. 176.

[514] Riddle v. Baker, 13 Cal. 295.

[515] Shepard v. Pebbles, 38 Wis. 373.

[516] Governor v. Shelby, 2 Blackf. (Ind.) 26; White v. State, 1 Blackf. (Ind.) 557; Lucas v. Governor, 6 Ala. 826 (distinguishing McClure v. Colclough, 5 Ala. 65, which was the case of a summary judgment under a statute, and was ruled as it was in order to carry out the supposed legislative intention); Pico v. Webster, 14 Cal. 202, 73 Am. Dec. 647; Carmichael v. Governor, 3 How. (Miss.) 236; Carmack v. Commonwealth, 5 Bin. (Pa.) 184; Rodini v. Lytle, 17 Mont. 448, 43 Pac. 501, 52 L. R. A. 165. A judgment against a principal, for his embezzlements as officer of a company, is not evidence against his surety either of the fact of the embezzlement or the amount embezzled. Fireman's Ins. Co. v. McMillan, 29 Ala. 147.

[517] Crawford v. Word, 7 Ga. 445; Taylor v. Johnson, 17 Ga. 521; Graves v. Bulkley, 25 Kan. 249, 37 Am. Rep. 249; Fay v. Edmiston, 25 Kan. 439;

tract of the surety on an official bond has reference to the general conduct of the officer within the sphere of his office, and not to his particular conduct in cases and transactions that should arise in the discharge of his official duties, and therefore they have no concern or interest to protect in an action brought against such public officer by one aggrieved by his misconduct. The law presumes that a judgment recovered against the principal rests on sufficient grounds of proof, but allows that presumption to be rebutted by proper evidence. It does not appear that any evidence rebutting such presumption was submitted to the jury in the present case, and therefore it was competent to rest the verdict on such judgment as proof of official misconduct." [518] But in Pennsylvania and some other states, the cases go so far as to hold that the judgment against the principal, in the absence of fraud or collusion, will be conclusive evidence against the sureties.[519] Without committing themselves to a generalization upon the subject, some of the courts are disposed to make the question rest upon the further inquiry whether the bond is joint or several. Thus, in a case in Massachusetts, it was decided that a judgment recovered without fraud or collusion against a constable for a wrongful attachment of the goods of a third person on a writ, is conclusive evidence, in an action against him and the sureties upon his bond, executed jointly and not severally.[520] And this view has much plausibility and good legal reason to commend it.

Hursey v. Marty, 61 Minn. 430, 63 N. W. 1090; Fire Ass'n of Philadelphia v. Ruby, 49 Neb. 584, 68 N. W. 939; Mullen v. Scott, 9 La. Ann. 173; Treasurers v. Temples, 2 Spears (S. C.) 48; Treasurers of State v. Bates, 2 Bailey (S. C.) 362; Atkins v. Baily, 9 Yerg. (Tenn.) 111; Munford v. Overseers of Poor of Nottoway, 2 Rand. (Va.) 313; City of Lowell v. Parker, 10 Metc. (Mass.) 309, 43 Am. Dec. 436; State v. Cason, 11 S. C. 392.

[518] State v. Cason, 11 S. C. 392.

[519] Masser v. Strickland, 17 Serg. & R. (Pa.) 354, 17 Am. Dec. 668; Evans v. Commonwealth, 8 Watts (Pa.) 308, 34 Am. Dec. 477; Eagles v. Kern, 5 Whart. (Pa.) 144; Snapp v. Commonwealth, 2 Pa. 49; Musselman v. Commonwealth, 7 Pa. 240; McMicken v. Commonwealth, 58 Pa. 213; Dane v. Gilmore, 51 Me. 544; McBroom v. Governor, 4 Port. (Ala.) 90; Tracy v. Goodwin, 5 Allen (Mass.) 409; Dennie v. Smith, 129 Mass. 143; Tute v. James, 50 Vt. 124; Thomas v. Markmann, 43 Neb. 823, 62 N. W. 206; Lewis v. Mills, 47 Neb. 910, 66 N. W. 817.

[520] Tracy v. Goodwin, 5 Allen, 409. In this case it was said: "Judicial reasonings and decisions having thus far left the question involved in much

We come now to the case of a bond given by a deputy sheriff to his principal, and the effect to be given, as evidence, to a judgment recovered against the sheriff for the fault or misconduct of the deputy, in the sheriff's subsequent action against the deputy and his sureties on such bond. And the authorities on this point, though less numerous, are more harmonious, as they rest the determination of the question upon the wording of the bond. Thus in a case in New York, where the defendants were sureties in a bond to the sheriff that their principal should "well and faithfully in all things perform and execute the duties of deputy sheriff, without fraud, deceit, or oppression," and a judgment was recovered against the sheriff for the alleged misconduct of such deputy, in a suit of which the deputy had notice, with a request to defend, but his sureties had no notice, it was held, in an action on the bond against the sureties, that the judgment was conclusive evidence of its own rendition, but not of the liability of the defendants, and they were at liberty to prove facts which would have constituted a good defense in the ac-

doubt, we have to decide it by a reference to the general principles which appear to be applicable to it. We must regard it as settled in this case that the judgment is competent evidence against the sureties; and it appears that the bond in suit is joint and not several. As to the constable, who is one of the defendants, the judgment proves conclusively the wrongful taking of the plaintiff's property and the amount of damages sustained by him. The execution of the bond and the taking of the property by color of his office being proved by other evidence, it follows that this joint bond was given for the purpose, among others, of securing the plaintiff against this tortious act of the officer. If no part of the judgment has been paid, the amount of it is the amount due from him on the bond. And the sureties have so made their bond that a joint judgment must be rendered in this suit against all the defendants. If they were permitted to open the matter and show that the plaintiff ought not to have recovered his judgment, in whole or in part, their defense must inure to the benefit of their principal as well as to theirs. We think it more in conformity with the true intent and spirit of their obligation to hold that it is a guaranty to the plaintiff for such amount as he has legally established to be due to himself from the constable, and that, in the absence of fraud or collusion, the judgment against him settles conclusively against his sureties, as well as himself, not only the right of the plaintiff to recover against him, but the amount of the damages. If the bond had been several as well as joint, there would have been less embarrassment in treating the evidence as prima facie, and permitting the sureties to offer rebutting evidence. We do not understand the presiding judge to have decided that the judgment was conclusive beyond these points."

tion against the sheriff.[521] But on the other hand, where the bond is conditioned that the deputy shall faithfully perform the duties of his office and shall "save and keep harmless and indemnified the said sheriff from all actions," etc., on account of any misfeasance or non-feasance of the deputy, the sureties are conclusively bound by a judgment recovered against the sheriff for the fault or neglect of the deputy.[522] The point of the distinction between these two cases is, that in the latter, the recovery of judgments against the obligee is the very thing stipulated against, while in the former, it is only the general conduct of the deputy in respect to his duties that falls within a fair interpretation of the bond. It remains to be added that the sureties of a sheriff can avail themselves of a former judgment in favor of their principal, although not parties to that action.[523]

§ 589. Sureties of Executors and Administrators.

When a judgment has been recovered against an executor or administrator as such, and subsequently the creditor brings suit upon the defendant's official bond, what weight is to be attributed to the judgment as evidence against the sureties on such bond? In a majority of the states the doctrine is well settled that such judgment is final and conclusive upon the sureties in the absence of fraud or collusion.[524] Thus it is not competent for the surety to impeach the

[521] Thomas v. Hubbell, 15 N. Y. 405, 69 Am. Dec. 619. See the same case in 35 N. Y. 120.

[522] Chamberlain v. Godfrey, 36 Vt. 380, 84 Am. Dec. 690; Hand v. Taylor, 4 Ind. 409; Wilkins v. Dingley, 29 Me. 73; Fay v. Ames, 44 Barb. (N. Y.) 327. See Jacobs v. Hill, 2 Leigh, 393.

[523] Brown v. Bradford, 30 Ga. 927; Inhabitants of Lower Alloways Creek v. Moore, 15 N. J. Law, 146.

[524] Stovall v. Banks, 10 Wall. 588, 19 L. Ed. 1036; Heard v. Lodge, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; White v. Weatherbee, 126 Mass. 450; McKim v. Haley, 173 Mass. 112, 53 N. E. 152; Judge of Probate v. Quimby, 89 Me. 574, 36 Atl. 1049; Willey v. Paulk, 6 Conn. 74; Baggott v. Boulger, 2 Duer (N. Y.) 160; Casoni v. Jerome, 58 N. Y. 315; McMahon v. Smith, 24 App. Div. 25, 49 N. Y. Supp. 93; In re Gall's Estate, 42 App. Div. 255, 59 N. Y. Supp. 254; Grim v. England, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826; Garber v. Commonwealth, 7 Pa. 265; Cureton v. Shelton, 3 McCord (S. C.) 412; Williamson v. Howell, 4 Ala. 693; Ragland v. Calhoun, 36 Ala. 606; Perkins v. Moore, 16 Ala. 9; Jones v. Ritter's Adm'r, 56 Ala. 270; Martin v. Tally,

judgment by merely showing that the administrator had paid the debt before the judgment was rendered.[525] But of course the surety is not concluded as to the factum of the bond, or its sufficiency in law, or as to any other defenses personal to himself.[526] And where the administrator collusively or negligently suffers judgment to be taken against him in an action barred by the statute of limitations, his sureties, when sued on their bond, are not estopped by the judgment to set up the statute.[527] On the same general principle, "the amount found due from an administrator or executor to the estate, on the settlement of his accounts in the probate court, is, in the absence of fraud or collusion, binding, not only upon him, but also upon his sureties in an action upon the administration bond, unless an appeal has been taken, or the judgment has been reversed upon a proceeding in error." [528]

Notwithstanding the general consensus of opinion is as above stated, it is possible to adduce a very respectable body of authorities which hold that the sureties of an executor or administrator are not bound by a judgment against their principal, unless they were made parties to the action or given an opportunity to contest it, and that

72 Ala. 23; Holley v. Acre, 23 Ala. 603; Furguson v. Glaze, 12 La. Ann. 667; McCalla's Adm'r v. Patterson, 18 B. Mon. (Ky.) 201; Hobbs v. Middleton, 1 J. J. Marsh. (Ky.) 176; Governor v. Shelby, 2 Blackf. (Ind.) 29; Goodwin v. Wilson, 1 Blackf. (Ind.) 344; Salyer v. State, 5 Ind. 204; Ralston v. Wood, 15 Ill. 159, 58 Am. Dec. 604; Housh v. People, 66 Ill. 178; State v. Holt, 27 Mo. 340, 72 Am. Dec. 273; Taylor v. Hunt, 34 Mo. 205; State v. Donegan, 12 Mo. App. 190; Irwin v. Backus, 25 Cal. 214, 85 Am. Dec. 125.

[525] Boyd v. Caldwell, 4 Rich. Law (S. C.) 117.

[526] Martin v. Tally, 72 Ala. 23.

[527] Dawes v. Shed, 15 Mass. 6, 8 Am. Dec. 80; Robinson v. Hodge, 117 Mass. 222.

[528] Slagle v. Entrekin, 44 Ohio St. 637, 10 N. E. 675; Fuller v. Cushman, 170 Mass. 286, 49 N. E. 631; Power v. Speckman, 126 N. Y. 354, 27 N. E. 474; Commonwealth v. Smith, 6 Pa. Dist. R. 416; Clark v. Newman's Adm'x (Ky.) 49 S. W. 310; Kenck v. Parchen, 22 Mont. 519, 57 Pac. 94, 74 Am. St. Rep. 625; Meyer v. Barth, 97 Wis. 352, 72 N. W. 748, 65 Am. St. Rep. 124; Treweek v. Howard, 105 Cal. 434, 39 Pac. 20; Biggins v. Raisch, 107 Cal. 210, 40 Pac. 333; Bellinger v. Thompson, 26 Or. 320, 37 Pac. 714; Thompson v. Dekum, 32 Or. 506, 52 Pac. 517. A final adjudication of the accounts of an executor cannot be questioned in a proceeding by a surety on the bond, for contribution, against his co-sureties. Thompson v. Dekum, supra.

the judgment is at best but prima facie evidence against them.[529] And in some of the states, it is held that, where an administrator is sued on an alleged debt of his intestate, and fails to plead a want of assets, a judgment against him is conclusive, so far as he is concerned, of the question of a sufficiency of assets to pay the debt; but, as to a surety on his bond, the judgment is merely prima facie evidence, and not conclusive on this question; and the surety, when sued on the bond, may plead and prove a deficiency of assets in the hands of his principal liable to the payment of the debt.[530] As in the parallel case of a sheriff's sureties, a judgment in favor of an administrator is a bar to an action upon the same subject-matter against his sureties.[531]

§ 590. Sureties of Guardians.

Upon the final settlement of the accounts of a guardian, the sureties on his bond are definitely concluded by the judgment or decision of the court, as to the amount due from their principal, and cannot be heard, in the absence of fraud, to question its correctness or ask a re-examination of the accounts.[532] This general rule, however, is

[529] Annett v. Terry, 35 N. Y. 256; Hayes v. Seaver, 7 Me. 237; Iglehart v. State, 2 Gill & J. (Md.) 235; Lyles v. Caldwell, 3 McCord (S. C.) 225; Craddock v. Turner's Adm'x, 6 Leigh (Va.) 116; Hobson v. Yancey, 2 Grat. (Va.) 73; Armistead v. Harramond, 11 N. C. 341; Norton v. Wallace, 1 Rich. Law (S. C.) 507; Ordinary of Charleston Dist. v. Condy, 2 Hill (S. C.) 313; Simkins v. Cobb, 2 Bailey (S. C.) 60; Bennett v. Graham, 71 Ga. 211; Means v. Hicks' Adm'r, 65 Ala. 241; Lipscomb v. Postell, 38 Miss. 476, 77 Am. Dec. 651; Verret v. Belanger, 6 La. Ann. 109; Canal & Banking Co. v. Brown, 4 La. Ann. 545; Fauntleroy v. Lyle, 5 T. B. Mon. (Ky.) 266; Seat v. Cannon, 1 Humph. (Tenn.) 470; Crim v. England, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826; Bird v. Mitchell, 101 Ga. 46, 28 S. E. 674; Brown v. Wiley, 107 Ga. 85, 32 S. E. 905.

[530] Gibson v. Robinson, 90 Ga. 756, 16 S. E. 969, 35 Am. St. Rep. 250; Banks v. Speers, 97 Ala. 560, 11 South. 841.

[531] State v. Coste, 36 Mo. 437, 88 Am. Dec. 148.

[532] Hailey v. Boyd's Adm'r, 64 Ala. 399; Commonwealth v. Rhoads, 37 Pa. 60; McCleary v. Menke, 109 Ill. 294; Ream v. Lynch, 7 Ill. App. 161; Gravett v. Malone, 54 Ala. 19; Braiden v. Mercer, 44 Ohio St. 339, 7 N. E. 155; Corbin v. Westcott, 2 Dem. Sur. (N. Y.) 559; McWilliams v. Kalbach, 55 Iowa, 110, 7 N. W. 463; Douglass v. Ferris, 138 N. Y. 192, 33 N. E. 1041, 34 Am. St. Rep. 435; Martin v. Porter, 32 App. Div. 602, 53 N. Y. Supp. 186; Eberle v. Bryant, 31 Misc. Rep. 814, 63 N. Y. Supp. 963; Botkin v. Klein-

modified in some of the states by the addition of the proviso that the sureties shall have been made parties to the accounting or afforded an opportunity to be heard in that proceeding.[533] And in North Carolina, a late case holds that a judgment rendered against the guardian is not conclusive in an action on the bond against the surety, although, by the code, it is made "presumptive" evidence.[534] So, in Louisiana, the surety is not concluded by a judgment against the tutor, though it is prima facie evidence against him.[535] In those states, however, where the generally accepted rule is in force, it is also held that a judgment removing a guardian is conclusive on his sureties, unless reversed or modified by some proceeding impeaching it.[536]

§ 591. Actions between Sureties for Contribution.

Where, in a suit against one of two sureties, judgment is fairly obtained against him, and no collusion existed between him and the party recovering the judgment or the principal obligor of the bond, if notice of the pendency of such suit has been given his co-surety, the latter stands virtually in privity with him against whom the judgment has been obtained. The co-surety in such case is bound to avail himself of any defense which he may have, and he will not be permitted afterwards, in a suit for contribution brought against him by his co-surety who has paid and satisfied the judgment, to set up any defense which he ought to have pleaded in the original suit upon the bond, by becoming a party for that purpose. It was his duty to join in the defense to the action. Having failed to do so, though he had full notice of the pendency of the action, he waives all

schmidt, 21 Mont. 1, 52 Pac. 563, 69 Am. St. Rep. 641. But an order of the probate court merely granting leave to sue on a guardian's bond is not res judicata of the liability of the sureties. Perkins v. Cheney, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495.

[533] State v. Hull, 53 Miss. 626; Brodrib v. Brodrib, 56 Cal. 563. See Weaver v. Thornton, 63 Ga. 655; In re Scott's Account, 36 Vt. 297; McKellar v. Bowell, 11 N. C. 34. And see Perkins v. Cheney, 114 Mich. 567, 72 N. W. 595, 68 Am. St. Rep. 495.

[534] Moore v. Alexander, 96 N. C. 34, 1 S. E. 536.

[535] Fuselier v. Babineau, 14 La. Ann. 764.

[536] Deegan v. Deegan, 22 Nev. 185, 37 Pac. 360, 58 Am. St. Rep. 742.

defenses he might have had, and in the suit for contribution the matter is res judicata.[537]

§ 592. Principal and Guarantor.

According to the best authorities, the general rule is, that in a collateral undertaking by way of guaranty, where a suit is necessary to fix the liability of the guarantor, the first judgment is prima facie evidence of the default. But where the guarantor is liable without suit against the principal, the judgment against him is regarded as strictly matter inter alios acta. Where the suit may, in the first instance, be brought directly against the guarantor, the judgment against the principal, without notice to the guarantor, is not evidence; and so, if the guarantor have notice of the suit against the principal, he is not obliged to concern himself in its defense, but may await a suit against himself, and then insist upon the right to contest the whole ground.[538] Thus, the owner of a judgment assigned it to another person, with a written guaranty of its payment in case the assignee should fail to collect it after prosecuting the debtor to insolvency. The assignee brought suit on the judgment against the debtor, who set up the defense of payment, and judgment went for the defendant on that issue. No notice of this suit was given to the assignor. Afterwards the assignee brought suit upon the contract of guaranty, and issue was taken upon the question whether the assigned judgment was, at the time, a valid and subsisting obligation or had been paid. It was held that the record of the former suit was not conclusive upon the guarantor, in the absence of notice to him.[539] As in the case of principal and surety, a guarantor may avail himself of a judgment which makes for the benefit of his principal. Thus a decree in equity against the

[537] Love v. Gibson, 2 Fla. 508; Preslar v. Stallworth, 37 Ala. 402; Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98. But compare Means v. Hicks' Adm'r, 65 Ala. 241; Clark v. Norman, 68 Hun, 372, 22 N. Y. Supp. 849.

[538] Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98; Spencer v. Dearth, 43 Vt. 98, 106; Robinson v. Lane, 14 Smedes & M. (Miss.) 161; Douglass v. Howland, 24 Wend. (N. Y.) 35; Ayres v. Findley, 1 Pa. 501. And see Eaton v. Harth, 45 Ill. App. 355; Crawford v. Pyle, 190 Pa. 263, 42 Atl. 687; Pearce v. Rice, 142 U. S. 28, 12 Sup. Ct. 130, 35 L. Ed. 925.

[539] Woodward v. Moore, 13 Ohio St. 136.

holder of a note, declaring it to be void as against one signer thereof, is the same in legal effect, between the holder and one who guaranties the collection, as a judgment for the defendant would be in a suit by the holder against that signer.[540] When one of several guarantors is sued for the debt, and suffers judgment, and pays the same, such judgment is not conclusive in an action against a co-guarantor for contribution, but the latter may make every defense which could have been presented in the original suit.[541]

§ 593. Conclusiveness of Judgment against Garnishee.

It is held by a considerable body of authorities that a judgment against the garnishee merges the original indebtedness, and therefore, even though unsatisfied, will bar an action by the defendant in the attachment against the garnishee for the same debt.[542] But in numerous other cases it is considered that such a judgment is merely a lien on the fund in the garnishee's hands, and nothing but payment of the judgment will protect the garnishee against a subsequent claim of the defendant.[543] But however this may be, it is universally agreed that when a judgment is recovered against the garnishee by the attaching creditor and paid, such judgment may be pleaded by the garnishee in bar of any action against him for the same debt brought by the principal defendant, up to the amount which the garnishee has paid.[544] Or, as the rule is expressed by a well-known

[540] Sterns v. Marks, 35 Barb. (N. Y.) 565.

[541] Kramph's Ex'x v. Hatz's Ex'rs, 52 Pa. 525.

[542] King v. Vance, 46 Ind. 246; Coburn v. Currens, 1 Bush (Ky.) 242; Sessions v. Stevens, 1 Fla. 233, 46 Am. Dec. 339; McAllister v. Brooks, 22 Me. 80, 38 Am. Dec. 282; Noble v. Merrill, 48 Me. 140.

[543] Meriam v. Rundlett, 13 Pick. (Mass.) 511; Farmer v. Simpson, 6 Tex. 303; Cook v. Field, 3 Ala. 53, 36 Am. Dec. 436; Brown v. Somerville, 8 Md. 444; Brannon v. Noble, 8 Ga. 549; Hammett v. Morris, 55 Ga. 644; Lowry v. Lumbermen's Bank, 2 Watts & S. (Pa.) 210.

[544] Killsa v. Lermond, 6 Me. 116; Ladd v. Jacobs, 64 Me. 347; Brown v. Dudley, 33 N. H. 511; Warner v. Conant, 24 Vt. 351, 58 Am. Dec. 178; Perkins v. Parker, 1 Mass. 117; Dole v. Boutwell, 1 Allen (Mass.) 286; Foster v. Jones, 15 Mass. 185; Holmes v. Remsen, 4 Johns. Ch. (N. Y.) 460, 8 Am. Dec. 581; Moore v. Spackman, 12 Serg. & R. (Pa.) 287; Coates v. Roberts, 4 Rawle (Pa.) 100; Anderson v. Young's Ex'rs, 21 Pa. 443; Noble v. Thompson Oil Co., 69 Pa. 409; Morgan v. Neville, 74 Pa. 52; Hitt v. Lacey, 3 Ala. 104, 36 Am. Dec. 440; Ross v. Pitts, 39 Ala. 606; Mills v. Stewart, 12 Ala. 90;

writer on this subject, "when, by a court having jurisdiction of the action and of the garnishee, judgment is rendered against him, and he has satisfied it in due course of law, such judgment is conclusive, against parties and privies, of all matters of right and title decided by the court, and constitutes a complete defense to any subsequent action by the defendant against the garnishee for the amount which the latter was compelled to pay." [545] Where the court has regularly obtained jurisdiction of the garnishee, and there is no answer on his part, the law and practice of some of the states allow the taking of a default judgment against him, and in such case it ought to protect the garnishee, at least if no defense on the merits could have been made.[546] But this rule is not universal.[547] And in one state it is held that an order to pay money made by the court on a garnishee, after his failure to appear in the garnishment proceeding, is not a judgment against him, so as to preclude him from setting

Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Cheairs v. Slaten, 3 Humph. (Tenn.) 101; Baltimore & Ohio R. Co. v. May, 25 Ohio St. 347; Barton v. Allbright, 29 Ind. 489; Greenman v. Fox, 54 Ind. 267; Canady v. Detrick, 63 Ind. 485; Allen v. Watt, 79 Ill. 284; Wigwall v. Union C. & M. Co., 37 Iowa, 129; Hirth v. Pfeifle, 42 Mich. 32, 3 N. W. 239; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

[545] Drake, Attachm. § 706. In a later section of the same work (§ 711) the author says: "When a payment under a judgment against a garnishee is relied on as a defense to a suit by the attachment defendant, it is important to observe the rules upon which it will be sustained. They may be compendiously stated as follows: 1. The judgment against the garnishee, under which he alleges he made the payment, must be proved. . . . . 2. It must have been a valid judgment. . . . . 3. The payment must not have been voluntary. . . . . 4. The payment must be actual, and not simulated or contrived. . . . . 5. The judgment under which the payment was made must have been rendered by a court having jurisdiction of the subject-matter and the parties. . . . . 6. Though the court have jurisdiction of the parties, and its judgment be valid as against the garnishee, yet if the law require the plaintiff, as a condition precedent to obtaining execution, to do a particular act, and without performing the condition he obtain execution, and the garnishee make payment under it, the payment will be no protection; for it is in the garnishee's power to resist the payment until the condition be fulfilled; failing in which, his payment is regarded as voluntary."

[546] Scamahorn v. Scott, 42 Iowa, 529; Abell v. Simon, 49 Md. 318; Gracy v. Coates, 2 McCord (S. C.) 224; Jones v. Tracy, 75 Pa. 417; Laughlin v. January, 59 Mo. 383.

[547] Hibernia Savings & Loan Soc. v. Superior Court, 56 Cal. 265.

up any defense to a suit by the attaching creditor for the garnished debt that he might have made before garnishment.[548] Before leaving the question of jurisdiction, it is necessary to remark that the judgment in a garnishment proceeding will be valid and binding so far as regards the disposition of the fund attached, if the court had jurisdiction of the res, although, for want of jurisdiction of the person of the debtor, it would not be binding upon him as a judgment in personam.[549] It is certainly necessary that the judgment should be valid, but it is not at all essential to its conclusive effect that it should be free from errors or irregularities. Like any other adjudication, a judgment against a garnishee, no matter how erroneous, is final and binding until it is reversed or set aside.[550] To take up now the converse case,—when judgment is entered against the plaintiff, the defendant is not thereby precluded from suing the garnishee in respect of the same subject-matter, because the defendant "has not had his day in court." [551] So where, after the institution of the garnishment suit, but before its final determination, an action is commenced by the principal defendant against the garnishee and prosecuted to final judgment, the result being in favor of the garnishee, such judgment is not conclusive upon the plaintiff in the earlier suit upon the question of the garnishee's discharge.[552] In regard to the scope of the estoppel created by such a judgment, it must be noted that it can only be made to cover the points actually and necessarily decided by the court. It is said that a judgment against a garnishee is not evidence for him in an action by his creditor for any other purpose than to show the amount for which he was charged.[553] Perhaps this statement of the rule, if taken literally, is somewhat too narrow. But an order, for example, discharging a person as garnishee of a judgment-debtor is no bar to an action against the same person to set aside as fraudulent a conveyance to him by the judg-

[548] Penyan v. Berry, 52 Ark. 130, 12 S. W. 241.

[549] Powell v. Geisendorff, 23 Kan. 538.

[550] Webster v. City of Lowell, 2 Allen (Mass.) 123.

[551] Ruff v. Ruff, 85 Pa. 333. Compare Whiteselle v. Jones (Tex. Civ. App.) 39 S. W. 405; Joseph v. Boldridge, 43 Mo. App. 333.

[552] Webster v. Adams, 58 Me. 317. Compare Scarritt Furniture Co. v. Moser, 48 Mo. App. 543.

[553] Puffer v. Graves, 26 N. H. 256.

ment-debtor, and to subject the property to a judgment against the grantor.[554] And even where there has been a recovery against the garnishee, on his disclosure that he was indebted to the principal defendant for the purchase-money of land, this will not estop the creditor from subsequently showing that the conveyance of such land was fraudulent and void as against creditors.[555] A defendant who seeks to avail himself, as a matter of defense, of a prior attachment by himself of the plaintiff's debt in his own hands, must show the existence of the original debt on which the judgment in the attachment was rendered; the record of the judgment is not even prima facie evidence in such action.[556]

§ 594. Not Conclusive as to Amount of Debt.

A judgment against the garnishee in an attachment proceeding is not conclusive as to the amount owing by the garnishee to the attachment defendant; and in a suit by the latter for the debt, the judgment on the garnishee process is not an absolute bar to the action, though, as a credit to the extent of the sum paid, it cannot be disputed.[557] The reason for this rule is easily discernible and rests on grounds of necessity. For, were it otherwise, "it would be in the power of a garnishee, by confessing in his answer a smaller indebtedness than actually existed, to practise an irremediable fraud upon his creditor." [558]

[554] Boyle v. Maroney, 73 Iowa, 70, 35 N. W. 145, 5 Am. St. Rep. 657.

[555] Wadsworth v. Marsh, 9 Conn. 481. "The plaintiff," said the court, "has done nothing which was not induced by the disclosure of the defendant. If his disclosure was false, is the plaintiff to be estopped by it? Such a consequence cannot be admitted. On the contrary, if the defendant, by a false disclosure, has contracted contradictory obligations, and subjected himself to superadded liabilities, the fault and the misfortune are both his own; but no person can be estopped by an act which is the result either of duress or the fraud or falsehood of another."

[556] Moyer v. Lobengeir, 4 Watts (Pa.) 390, 28 Am. Dec. 723.

[557] Barton v. Allbright, 29 Ind. 489; Tams v. Bullitt, 35 Pa. 308; Groves v. Brown, 11 Mass. 334; Brown v. Dudley, 33 N. H. 511; Puffer v. Graves, 26 N. H. 256; Drew v. Towle, 27 N. H. 412, 59 Am. Dec. 380; Carpenter v. McClure, 37 Vt. 127.

[558] Drake, Attachm. § 707.

§ 595. Right of Garnishee to Question Legality of Prior Proceedings.

In an interesting and well considered case in Illinois the question arose, whether a garnishee, who sued out a writ of error to reverse a judgment rendered against him, might inquire into the legality and regularity of the previous proceedings against the defendant in attachment. "In one respect," said the court, "he unquestionably can. In a suit by attachment, the court must acquire jurisdiction, and proceed to enter a judgment against the defendant, before it can pronounce any judgment against a party summoned as garnishee. If the previous proceedings are unauthorized and void, there is no sufficient basis to support the judgment against the garnishee. He would not be protected in the payment of a judgment obtained under such circumstances. It would be regarded as a voluntary and not a compulsory payment, and the defendant might compel him to pay a second time. It is clear, therefore, that a garnishee should be permitted to inquire into the validity of the previous proceedings in the case. If such proceedings are void, the judgment against the garnishee may for that cause be reversed on error. But if the court had jurisdiction, its errors and irregularities can only be called in question by the defendant, and that too in a direct proceeding for the purpose. They affect him only, and he may waive or insist on them. The garnishee has no cause to complain, for he will be protected in the payment of the judgment." [559] And in this doctrine the authorities generally agree.[560]

§ 596. As between Garnishee and Assignee of Claim.

It is a well established rule that if the garnishee, before making his disclosure, is duly notified that the claim had been assigned to a third person before service was made on him, it is his duty to dis-

[559] Pierce v. Carleton, 12 Ill. 358, 54 Am. Dec. 405.

[560] Earl v. Matheney, 60 Ind. 202; Sun Mut. Ins. Co. v. Seeligson, 59 Tex. 3; Whitehead v. Henderson, 4 Smedes & M. (Miss.) 704; Matheny v. Galloway, 12 Smedes & M. (Miss.) 475; St. Louis Perpetual Ins. Co. v. Cohen, 9 Mo. 421; Schoppenhast v. Bollman, 21 Ind. 285; Iroquois Furnace Co. v. Wilkin Manuf'g Co., 77 Ill. App. 59; Summers v. Oberndorf, 73 Md. 312, 20 Atl. 1068.

close such assignment in his answer, in order that the assignee may be cited to appear in protection of his own interests. And if the garnishee neglects to so disclose the fact of the assignment, his being charged as garnishee and paying the amount found due, on execution, will not protect him from being compelled to make a second payment of the same to the assignee.[561] If the garnishee does make a full and fair disclosure of all the facts in his knowledge, and uses all reasonable exertions to protect the rights of the assignee (he being a stranger to the proceedings and absent), it is probable that a judgment holding the garnishee liable would be accounted a sufficient protection to him against the claims of the assignee, notwithstanding the proceedings would be inter alios as respects the latter. But if the garnishee makes only a partial disclosure, so that the court has no opportunity to judge of the real merits of the case, and especially if there are any indications of collusion between him and the creditor, it is clear that the judgment will furnish him no protection whatever.[562] If the assignment is made after the institution of the garnishment proceedings, the case is different. Thus where A., the debtor of B. upon a promissory note not due, was summoned by C., the creditor of B., to answer upon process of garnishment, and B. subsequently transferred the note to D. with express notice of the pendency of the garnishment, it was held that a judgment against A. in favor of C. might be pleaded in bar of the suit of D. as assignee.[563] And if the garnishee has no notice or knowledge of the assignment before the rendition of the judgment against him, he will be fully protected against the assignee.[564] It is therefore the duty of the assignee, whenever the garnishment proceeding comes to his knowledge, to notify the garnishee, so that the latter, when called upon to answer the interrogatories, may be enabled to disclose the whole matter to the court, and unless he does this, he will afterwards be estopped from enforcing his claim.[565] The duty of a garnishee who

[561] Bunker v. Gilmore, 40 Me. 88; Larrabee v. Knight, 69 Me. 320; Milliken v. Loring, 37 Me. 408; Drake, Attachm. § 717, and cases cited. See McPhail v. Hyatt, 29 Iowa, 137; Anderson v. Young's Ex'rs, 21 Pa. 443.

[562] Seward v. Heflin, 20 Vt. 144.

[563] Glanton v. Griggs, 5 Ga. 424.

[564] King v. Vance, 46 Ind. 246.

[565] Wood v. Partridge, 11 Mass. 488.

receives notice of the assignment after he has filed his answer but before the rendition of judgment, is not entirely clear. It has been held that if the garnishee, after answering that he owes negotiable notes, has notice that they were assigned before the garnishment, he must amend his answer by stating the assignment; otherwise he is not protected against the assignee by the recovery in the garnishment proceeding, but subjects himself to double payment of the debt.[566] On principles similar to the foregoing, the authorities hold that where two successive attachments are levied on the same fund in the garnishee's hands at the suit of different creditors, it is the duty of the garnishee to give notice to the prior attaching creditor of the issuance of the second attachment, and to plead the pendency of the first attachment in bar of the second; and if he neglects to do this, and a judgment is recovered against him under the second attachment, which he satisfies, he will not be protected from the claims of the prior attaching creditor, but will have to pay him also; because the latter cannot be divested of his superior lien by a judgment in a cause to which he was not a party and of which he had no notice.[567]

§ 597. As between Garnishee and Stranger.

A judgment for or against a garnishee, in an action of attachment by one creditor is not binding upon another creditor in an attachment suit by him against the same garnishee, and the record of the judgment in the former case is not admissible in evidence on the trial of the latter.[568] So a judgment against the garnishee is not conclusive in a subsequent action by the trustees in insolvency of the defendant in the attachment against the garnishee, because the creditors, whom the trustees represent, were not parties.[569] But it is held that an attachment laid in the hands of the maker of a promissory note, as garnishee, for the debt of an indorsee then being the owner and holder of the note, followed by a judgment of condemnation on

[566] Lewis v. Dunlop, 57 Miss. 130.

[567] Farmers' Bank v. Beaston, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226.

[568] Strauss v. Ayres, 87 Mo. 348; Wheeler v. Aldrich, 13 Gray (Mass.) 51; Lewis v. Tams, 4 Phila. (Pa.) 276; Breading v. Siegworth, 29 Pa. 396; King v. Faber, 51 Pa. 387; Adams v. Filer, 7 Wis. 306, 73 Am. Dec. 410.

[569] Tams v. Bullitt, 35 Pa. 308.

the attachment, will protect the maker (garnishee) in a subsequent action, brought on the same note, by a subsequent indorser receiving the paper without notice.[570] And so the recovery of a debt in a scire facias against a garnishee, upon a judgment in a foreign attachment, is a bar to a recovery of the same debt from the garnishee by a person who took defense on the trial of the scire facias, provided such recovery was not the result of misrepresentation, fraud, or neglect on the part of the garnishee, or of collusion between him and the plaintiff.[571] Again, the judgment as between an attaching creditor and the garnishee is not res inter alios in the main contention between debtor and creditor. "As respects the principal debtor, he cannot be regarded as a stranger to the suit, being necessarily a party and having an opportunity to contest the claim against him. These cases, like a judgment to show the amount that a surety has been compelled to pay for his principal, or a principal for the default of his agent, are exceptions to the general rule." [572]

§ 598. Foreign Judgment against Garnishee.

It is well settled that a judgment fairly rendered against a garnishee by a lawful court in a foreign country or in a sister state, having jurisdiction of the person and subject-matter, will be equally conclusive and final, in a subsequent proceeding for the recovery of the same debt, as if rendered in the state where the second contention arises.[573] But the pendency of a foreign attachment in one state, upon which a judgment has been rendered, and an injunction granted by the court of chancery upon the garnishee, forbidding him to pay to the defendant in the attachment, is not the subject of a plea in bar in another state, in an action by the original creditor against the debtor, but the defendant can only avail himself of it by plea in abatement. Under such circumstances, nothing short of an actual pay-

[570] Somerville v. Brown, 5 Gill (Md.) 399.

[571] Coates v. Roberts, 4 Rawle (Pa.) 100.

[572] Ockington v. Richey, 41 N. H. 275.

[573] Merlam v. Rundlett, 13 Pick. (Mass.) 511; Hull v. Blake, 13 Mass. 153; Wilkinson v. Hall, 6 Gray (Mass.) 568; Barrow v. West, 23 Pick. (Mass.) 270; Taylor v. Phelps, 1 Har. & G. (Md.) 492.

ment of the money by the garnishee, or levy of his goods upon an execution, can be pleaded in bar.[574]

§ 599. Effect of a Judgment as between Co-Defendants.

As a general rule, parties to a judgment are not bound by it in a subsequent controversy between themselves, unless they were adversary parties in the original action. That is to say, a judgment for or against two or more joint parties ordinarily determines nothing as to their respective rights and liabilities, as against each other, in their own subsequent controversy.[575] "Where two parties are sued in the same action," says the supreme court of Indiana, "and one files a separate answer to the complaint, and not in the nature of a cross-complaint against his co-defendant, such co-defendant cannot, under our code of practice, demur or reply to or join issue in any manner upon such separate answer. And in such a case the finding and judgment of the court, on an issue joined on such separate answer by the plaintiff, will not necessarily conclude and determine any of the merely relative rights of the defendants as between themselves." [576] Thus, where the makers of a note are sued and judgment rendered against them, but the question of the suretyship of one of them is not raised in that action, the judgment will not preclude that one from showing that he in fact signed the note as

[574] Lowry v. Lumbermen's Bank, 2 Watts & S. (Pa.) 210.

[575] McMahan v. Geiger, 73 Mo. 145, 39 Am. Rep. 489; Buffington v. Cook, 35 Ala. 312, 73 Am. Dec. 491; Montgomery v. Road, 34 Kan. 122, 8 Pac. 253; Gardner v. Raisbeck, 28 N. J. Eq. 71; McCrory v. Parks, 18 Ohio St. 1; Cox's Adm'rs v. Hill, 3 Ohio, 412; Duncan v. Holcomb, 26 Ind. 378; Cleveland v. Chambliss, 64 Ga. 352; Wagstaff v. Marcy, 25 Misc. Rep. 121, 54 N. Y. Supp. 1021; Mahoney v. Prendergast, 58 Hun, 611, 12 N. Y. Supp. 869; O'Connor v. New York & Y. Land Imp. Co., 8 Misc. Rep. 243, 28 N. Y. Supp. 544; Denike v. Denike, 44 App. Div. 621, 60 N. Y. Supp. 110; Hoxie v. Farmers' & Mechanics' Nat. Bank, 20 Tex. Civ. App. 462, 49 S. W. 637; Koelsch v. Mixer, 52 Ohio St. 207, 39 N. E. 417; Westfield Gas. & Milling Co. v. Noblesville & E. Gravel-Road Co., 13 Ind. App. 481, 41 N. E. 955, 55 Am. St. Rep. 244; Voss v. Lewis, 126 Ind. 155, 25 N. E. 892; O'Rourke v. Lindell Ry. Co., 142 Mo. 342, 44 S. W. 254; State Bank v. Bartle, 114 Mo. 276, 21 S. W. 816; Pioneer Sav. & Loan Co. v. Bartsch, 51 Minn. 474, 53 N. W. 764, 38 Am. St. Rep. 511; Logan v. Trayser, 77 Wis. 579, 46 N. W. 877; In re Heydenfeldt's Estate, 127 Cal. 456, 59 Pac. 839.

[576] Harvey v. Osborn, 55 Ind. 535.

surety only, in a subsequent action by him against the other maker to recover the amount of the judgment paid by him.[577] But it is held that a judgment obtained by the holder of a note against all the indorsers is conclusive in a subsequent action, by an indorser, who paid the judgment, against a prior indorser, and as much so as if he had claimed subrogation upon it. For all the points which the second indorser would have to prove as against the prior indorser must have been established in the suit brought by the holder.[578] An exception to the general rule arises in the case where conflicting claims to the ownership of property are affirmatively made and set up in their answers by several defendants in an action. Here a court of equity (and also, under the code practice, a court of mixed powers) may by its judgment determine the rights of such defendants among themselves, and such judgment will be equally conclusive, as between the defendants who appeared and litigated their claims, as in the case of a similar issue between the plaintiff and the defendants.[579] Thus where, in an action to quiet title, two defendants answer separately, each claiming title in himself, and the court finds that the property is owned by one of such defendants, and enters a decree quieting the title in him as against the plaintiff, such decree is also an adjudication of the question of title as between the defendants, and constitutes a bar to any future claim to the property against the successful party, or those claiming through him, by his co-defendant.[580]

§ 600. Judgments do not bind Strangers.

Hitherto we have discussed the situation of parties and privies with reference to the estoppel created by a verdict and judgment,

[577] Lockhart v. Gillis (Tex.) 20 Reporter, 477; McMahan v. Geiger, 73 Mo. 145, 39 Am. Rep. 489; Joyce v. Whitney, 57 Ind. 550; Dent v. King, 1 Ga. 200, 44 Am. Dec. 638; Harvey v. Osborn, 55 Ind. 535.

[578] Lloyd v. Barr, 11 Pa. 41.

[579] Corcoran v. Chesapeake & O. Canal Co., 94 U. S. 741, 24 L. Ed. 190; O'Hara v. Mobile & O. R. Co. (C. C.) 75 Fed. 130; Leavitt v. Wolcott, 95 N. Y. 212; Ostrander v. Hart, 130 N. Y. 406, 29 N. E. 744; Baugert v. Blades, 117 N. C. 221, 23 S. E. 179; Osage City Bank v. Jones, 51 Kan. 379, 32 Pac. 1096; Nave v. Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; Goldschmidt v. Mills, 37 Minn. 49, 33 N. W. 544.

[580] Devin v. City of Ottumwa, 53 Iowa, 461, 5 N. W. 552.

and it has appeared that they and they alone are concluded by the adjudication. In a broad and general sense all other persons are "strangers" to the judgment and, as such, exempt from its effect as evidence or as an estoppel. But if we wish to use this word in a perfectly accurate and technical sense, it is necessary to make a reservation of the case of those persons who, though not strictly parties nor privies, are so connected with the litigation or its subject-matter as to be bound by the result. Such are warrantors, indemnitors, and others responsible over, who have due notice, and, in some instances, sureties or bail. But in this narrower sense, and with the further exception of certain especial cases which will be noticed in the succeeding sections, it is a universal rule that all who are neither parties to a judgment nor privies to such parties are wholly free from the estoppel of the judgment. This principle was well known in the Roman law,[581] and indeed is nothing less than a canon of general jurisprudence. That the rule is firmly imbedded in our own law is attested by a multitude of decided cases.[582] It was

[581] Codex, 7, 56, 2. See Broom, Leg. Max. 954; Wing. Max. 372.

[582] United States. Chirac v. Reinicker, 11 Wheat. 280, 6 L. Ed. 474; Aspden v. Nixon, 4 How. 467, 11 L. Ed. 1059; Mutual Ben. Life Ins. Co. v. Tisdale, 91 U. S. 244, 23 L. Ed. 314; Humes v. Scruggs, 94 U. S. 22, 24 L. Ed. 51; Noyes v. Hall, 97 U. S. 34, 24 L. Ed. 909; Hale v. Finch, 104 U. S. 261, 26 L. Ed. 732; Cleveland v. Spencer, 25 U. S. App. 626, 19 C. C. A. 559, 73 Fed. 559; Jones v. Wilkey (C. C.) 78 Fed. 532; Lenox v. Notrebe, Hempst. 251, Fed. Cas. No. 8,246c.

Alabama. McLelland v. Ridgeway, 12 Ala. 482; Winston v. Westfeldt, 22 Ala. 760, 58 Am. Dec. 278; Miller v. Vaughan, 73 Ala. 312.

Arkansas. Garland County v. Hot Spring County, 68 Ark. 83, 56 S. W. 636; Memphis & L. R. R. Co. v. State, 37 Ark. 632.

California. Roman Catholic Archbishop v. Shipman, 69 Cal. 586, 11 Pac. 343; Griffith v. Happersberger, 86 Cal. 605, 25 Pac. 137; Weinreich v. Hensley, 121 Cal. 647, 54 Pac. 254; Town of Cloverdale v. Smith, 128 Cal. 230, 60 Pac. 851.

Colorado. Schuster v. Rader, 13 Colo. 329, 22 Pac. 505.

Connecticut. Dennison v. Hyde, 6 Conn. 508; Cook v. Town of Morris, 66 Conn. 137, 33 Atl. 594.

Delaware. Burton v. Hazzard, 4 Har. 100.

Florida. Reddick v. Meffert, 32 Fla. 409, 13 South. 894; Marvin v. Hampton, 18 Fla. 131; Knox v. Spratt, 19 Fla. 817.

Georgia. Mays v. Compton, 13 Ga. 269; Brock v. Garrett, 16 Ga. 487; Clayton v. West, 97 Ga. 328, 22 S. E. 901.

said, in the leading case on this subject: "What has been said at the bar is certainly true as a general principle, that a transaction

Illinois. Kelley v. Chapman, 13 Ill. 530, 56 Am. Dec. 474; Gaytes v. Franklin Sav. Bank, 85 Ill. 256.

Indiana. Maple v. Beach, 43 Ind. 51; Cray v. Wright, 16 Ind. App. 258, 44 N. E. 1009; Goss v. Wallace, 140 Ind. 541, 39 N. E. 920.

Iowa. Baxter v. Myers, 47 N. W. 879; Spurgin v. Adamson, 62 Iowa, 661, 18 N. W. 293.

Kansas. Kansas Pac. Ry. Co. v. McBratney, 12 Kan. 9.

Kentucky. Marshall v. Rough's Heirs, 2 Bibb, 628; Newson v. Lycan, 3 J. J. Marsh. 440, 20 Am. Dec. 156; Norton v. Norton, 25 S. W. 750.

Louisiana. Lefebvre v. De Montilly, 1 La. Ann. 42; Mestier v. New Orleans, O. & G. W. R. Co., 16 La. Ann. 354.

Maine. Jackson v. Myrick, 29 Me. 490; Sheldon v. White, 35 Me. 233; Trustees of Putnam Free School v. Fisher, 34 Me. 172; Snow v. Russell, 94 Me. 322, 47 Atl. 536.

Maryland. Alexander v. Walter, 8 Gill, 239, 50 Am. Dec. 688; McClellan v. Kennedy, 8 Md. 230; Niller v. Johnson, 27 Md. 6.

Massachusetts. Hood v. Hood, 110 Mass. 463; Andrews v. Herring, 5 Mass. 210; Vose v. Morton, 4 Cush. 27, 50 Am. Dec. 750; Shores v. Hooper, 153 Mass. 228, 26 N. E. 846, 11 L. R. A. 308.

Michigan. Aultman, Miller & Co. v. Sloan, 115 Mich. 151, 73 N. W. 123; Fisher v. Wineman, 125 Mich. 642, 84 N. W. 1111, 52 L. R. A. 192.

Minnesota. Nowack v. Knight, 44 Minn. 241, 46 N. W. 348; Kurtz v. St. Paul & D. Ry. Co., 65 Minn. 60, 67 N. W. 808.

Mississippi. Moore v. Cason, 1 How. 53; McPike v. Wells, 54 Miss. 136; Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 South. 200.

Missouri. Norcross v. Hudson, 32 Mo. 227; Dugge v. Stumpe, 73 Mo. 513; Hunt v. Lucas, 68 Mo. App. 518; Bonnell v. Pack, 79 Mo. App. 496.

Nebraska. McCord-Brady Co. v. Krause, 36 Neb. 764, 55 N. W. 215; Connell v. Galligher, 36 Neb. 749, 55 N. W. 229.

New Hampshire. Lawrence v. Haynes, 5 N. H. 33, 20 Am. Dec. 554; Stevens v. Thompson, 17 N. H. 103; Wingate v. Haywood, 40 N. H. 437.

New Jersey. Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co., 55 N. J. Law, 350, 26 Atl. 920; Ransom v. Brinkerhoff, 56 N. J. Eq. 149, 38 Atl. 919.

New York. Lawrence v. Hunt, 10 Wend. 80, 25 Am. Dec. 539; Jackson v. Vedder, 3 Johns. 8; Remington Paper Co. v. O'Dougherty, 81 N. Y. 474.

North Carolina. Bennett v. Holmes, 18 N. C. 486.

Ohio. Stewart v. Wheeling & L. E. Ry. Co., 53 Ohio St. 151, 41 N. E. 247, 29 L. R. A. 438.

Oregon. De Lashmutt v. Sellwood, 10 Or. 319.

Pennsylvania. Morrison's Adm'r v. Mullin, 34 Pa. 12; Mackey's Adm'r v. Coates, 70 Pa. 350.

South Carolina. Hardin v. Clark, 32 S. C. 480, 11 S. E. 304; Koogler v. Huffman, 1 McCord, 495.

between two parties, in a judicial proceeding, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defense, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the deposition of witnesses in another cause in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers." [583] And in another case: "It contravenes the first principles of justice to hold a man bound by a judgment against which he has neither an opportunity to defend, or notice in any way that he was to be directly involved in its consequences." [584] So again: "No person can be divested of title to his property in a suit between other parties of which he has no legal notice, and a judgment rendered in such a suit is not binding upon him, and is not admissible in evidence against him in any future proceeding in which the title to the property is in controversy." [585] The same rule holds good in chancery as well as at law. Strangers to a decree are not bound by it.[586] From the foregoing quotations, as also

Tennessee. Simpson v. Jones, 2 Sneed, 36; Arnold v. Harris (Ch. App.) 52 S. W. 715.

Texas. Morrison v. Loftin, 44 Tex. 16; Hardin v. Blackshear, 60 Tex. 132; Black v. Black, 62 Tex. 296; Bassett v. Sherrod, 13 Tex. Civ. App. 327, 35 S. W. 312.

Vermont. Nason v. Blaisdell, 12 Vt. 165, 36 Am. Dec. 331; Wright v. Hazen, 24 Vt. 143.

Virginia. Frazier v. Frazier's Ex'rs, 2 Leigh, 642; Downer v. Morrison, 2 Grat. 250.

West Virginia. Renick v. Ludington, 20 W. Va. 511.

Wisconsin. Cameron v. Cameron, 15 Wis. 1, 82 Am. Dec. 652; Grunert v. Spalding, 104 Wis. 193, 80 N. W. 589; Hart v. Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881.

[583] Duchess of Kingston's Case, 20 How. St. Trials, 355, 2 Smith, Lead. Cas. *424.

[584] Morrison's Adm'r v. Mullin, 34 Pa. 12.

[585] Foster v. Powers, 64 Tex. 247.

[586] McCall v. Harrison, 1 Brock. 126, Fed. Cas. No. 8,671; Bailey's Adm'x v. Robinson, 1 Grat. (Va.) 4, 42 Am. Dec. 540; Loop v. Summers, 3 Rand. (Va.) 511; Manigault v. Deas' Adm'rs, Bailey, Eq. (S. C.) 283; Buford v. Rucker, 4 J. J. Marsh. (Ky.) 551; Brown v. Wyncoop, 2 Blackf. (Ind.) 230; Rowland v. Day, 17 Ala. 681; Lang's Heirs v. Waring, Id. 145; Cockey v.

from our previous discussion of the question, who are to be considered parties and privies, it will be possible to derive a sufficiently accurate idea of the tests which are to be applied in ascertaining whether or not a given person must be regarded as a stranger to a given litigation. The authorities hold that when a person is a mere volunteer at the trial of a cause, and has no legal right to control the proceedings in the action, or to make any defense, or examine the witnesses, or prosecute proceedings in error from the rulings and judgment in the case, such person is to be considered as a stranger to the cause, and is not concluded by the judgment rendered therein.[587] "No party can ever be estopped or in any way prejudiced by any judgment or decree, if the record in the first suit on its face shows that he had no opportunity to be heard in opposition to the entry of such judgment or decree."[588] But in ordinary cases it can never be difficult to determine, by the application of the rules already given in this chapter, whether the person sought to be bound was a real or nominal party to the former action, or in privity with either of the parties, or responsible for the result of the litigation, or strictly a stranger. Before proceeding further, it may be useful to adduce some illustrations of the rule under consideration. A tax purchaser of real estate, for example, who was not a party to an action to enjoin the officials from issuing a deed, and did not appear in that action, is not bound by the decree.[589] A judgment in favor of one partner, in a suit in which he alone is served and made a party, is no bar or evidence of payment in another suit by the same plaintiff, against another partner, on the same cause of action.[590] So a judgment in a suit determining the existence or non-existence of a co-partnership relation between the parties thereto, is not binding on or admissible in evidence against strangers to

Milne's Lessee, 16 Md. 200. The decree made in a cause does not bind one who was originally a party but was permitted to withdraw during the suit. Owens v. Alexander, 78 N. C. 1.

[587] Wilkie v. Howe, 27 Kan. 518; Hale v. Finch, 104 U. S. 261, 26 L. Ed. 732. See Lower Latham Ditch Co. v. Louden Irrigating Canal Co., 27 Colo. 267, 60 Pac. 629, 83 Am. St. Rep. 80.

[588] McCoy v. McCoy, 29 W. Va. 794, 2 S. E. 809.

[589] Helprey v. Redick, 21 Neb. 80, 31 N. W. 256.

[590] McLelland v. Ridgeway, 12 Ala. 482.

the proceeding.[591] In an action against a county to recover the amount of bonds issued in aid of the construction of a railroad, plaintiff is not concluded by a judgment in an action to enjoin the collection of the tax levied for the payment of the bonds, to which he was not a party.[592] Again, in a suit by a husband for divorce on the ground of adultery, a decree of divorce granted in another court, in an action by the co-respondent's wife against him for divorce on the ground of adultery with defendant, in which suit defendant was not a party, is not competent evidence.[593] The finding and judgment of a court granting a wife a decree of divorce from her husband, on the ground of cruelty, are not evidence that she was justified in leaving her husband's home and living apart from him, in an action brought by a third person against the husband for board and lodging furnished to the wife while she was so living separate from the husband.[594] The issuance of letters of administration on a petition reciting that petitioner was the husband of the intestate is not conclusive as to such recital against a person who had no notice of the proceeding.[595] Where an infant is injured in an accident, and sues for damages, and an action is also brought by his father for the loss of the child's services, the judgment rendered in one of the suits is not competent evidence in the other suit, on the question whether the accident was due to the negligence or fault of the defendant.[596] The record of a suit by the United States on the bond of a surveyor who was claimed to have made a fraudulent survey, in which a verdict was found for the defendant, is not admissible in a suit between other parties to prove that the survey was correct.[597] So a judgment, in an action by a creditor against his debtor, that an assignment by the latter is void,

[591] McDonald v. Matney, 82 Mo. 358; Van Kleeck v. McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182; Missouri Pac. Ry. Co. v. Heidenheimer, 82 Tex. 195, 17 S. W. 608, 27 Am. St. Rep. 861.

[592] Morrill v. Smith County (Tex. Civ. App.) 33 S. W. 899.

[593] Rice v. Rice (N. J. Ch.) 23 Atl. 946.

[594] Belknap v. Stewart, 38 Neb. 304, 56 N. W. 881, 41 Am. St. Rep. 729; Inhabitants of Sturbridge v. Franklin, 160 Mass. 149, 35 N. E. 669.

[595] In re Patterson's Estate, 79 Hun, 371, 29 N. Y. Supp. 451.

[596] Malsky v. Schumacher, 7 Misc. Rep. 8, 27 N. Y. Supp. 331; Guy v. Fisher & Burnett Lumber Co., 93 Tenn. 213, 23 S. W. 972.

[597] Michigan Land & Lumber Co. v. Rust, 15 C. C. A. 335, 68 Fed. 155.

in no way affects the rights of the assignee, who is not a party to such action.[598] And as an adjudication is not conclusive against a stranger, so neither can a stranger take advantage of it. Thus, a plaintiff will not be allowed to introduce in evidence a judgment obtained against the defendant in another case, to which the plaintiff was not a party, to prove fraud in the defendant.[599] It is immaterial that the United States was a party to the suit in which the former judgment was rendered, if the parties in the second action are different; because privity to the government must appear from the facts, as well as privity to individuals.[600]

§ 601. Exception; Courts of Exclusive Jurisdiction.

Several important exceptions to the general rule that judgments are not conclusive upon strangers remain to be noted. In the first place, it is said that "where the matter adjudicated is by a court of peculiar and exclusive jurisdiction, and the same matter comes incidentally before another court, the sentence in the former is conclusive upon the latter, as to the matter directly decided, not only between the same parties, but against strangers, unless it can be impeached on the ground of fraud or collusion." [601] But it is not believed that this doctrine could have any proper application except in the case of judgments in rem, or judgments determining matters of public right or of police.

§ 602. Exception; Judgments in Rem.

A second important exception to the general rule is found in the case of judgments in rem. Adjudications of this character, for certain special reasons which will appear later, are held to be binding and conclusive, not only upon the immediate parties to the litigation, but upon all persons who may be interested in the res. As the subject is one of much importance and of a distinctive character, it is reserved for consideration in a future chapter.

[598] Avera v. Rice, 64 Ark. 330, 42 S. W. 409.
[599] Winston v. Starke, 12 Grat. (Va.) 317.
[600] Barton v. Long, 45 N. J. Eq. 841, 14 Atl. 565, 19 Atl. 623.
[601] Rhoades v. Selin, 4 Wash. C. C. 715, Fed. Cas. No. 11,740.

§ 603. Exception; Principle of Stare Decisis.

According to the doctrine of the best cases, a title previously passed upon, although in a suit between different parties, will not be again examined and adjudicated, in a case proceeding upon the same state of facts and presenting precisely the same question, in the absence of a showing that the former decision was manifestly erroneous.[602] This, however, is not strictly upon the ground that the matter is res judicata, but rather upon those settled principles which induce the courts to abide by their own former decisions, that is, the rule of stare decisis. In the case cited the court of appeals of Maryland said: "We may concede, for the sake of the argument, that, technically and strictly speaking, this suit is not res judicata, because the parties are different, and the present parties should not be held conclusively bound by the decision in that case, in which they had no opportunity to be heard. We may also concede that the judgment in that case is not what may properly be termed a judgment in rem and binding on the world. We may also further concede the power of the court to reverse its own decision. But notwithstanding all this, we think that both sound reason and the authority of adjudged cases will amply justify us in a refusal to reopen this question of title." But on the other hand, it is held, in Texas, that the fact that a stranger to a suit has been induced to locate certain land by reason of a decision of the supreme court, which declared that the title of a party to the suit was void, will not estop such party from asserting his title to the property in a subsequent action brought by such stranger to try title.[603] These cases, however, are not strictly germane to our immediate subject, the discussion of which we now resume.

§ 604. Judgment as Evidence of its own Existence.

A judgment is always admissible and conclusive evidence, even against strangers, of the fact of its own rendition and of its neces-

[602] Kolb v. Swann, 68 Md. 516, 13 Atl. 379. And see People v. Board of Sup'rs of Erie County, 26 Misc. Rep. 233, 56 N. Y. Supp. 318.

[603] Groesbeck v. Golden, 7 S. W. 362.

sary legal consequences. In other words, "the record of a verdict and judgment is always admissible to prove the fact that such judgment was rendered, or such verdict returned, in any case where the fact of such verdict or judgment, or the nature or amount of such judgment, becomes material." [604] This important principle is more fully explained in an opinion of the supreme court of Vermont, from which we quote as follows: "A verdict or judgment is offered either to establish the mere fact of its own rendition, and those legal consequences which result from the fact, or is offered with a view to a collateral purpose,—that is, to prove not only the fact that such a verdict has been rendered, or such judgment pronounced, and so let in all the necessary and legal consequences, but as a medium of proving some fact as found by the verdict, or upon whose supposed existence the judgment is based. For the first of these purposes, that is, for establishing the fact that such a verdict has been given, or such a judgment pronounced, and all the consequences of such a judgment, the judgment itself is invariably not only admissible as the proper legal evidence, but usually conclusive to prove that fact. The mere fact that such a judgment was given can never be considered as res inter alios acta, neither can the legal consequences of a judgment be so considered. But with reference to any fact upon whose supposed existence the judgment is founded, the proceeding may or may not be res inter alios, and consequently may or may not be evidence according to circumstances, considering the nature of the facts themselves and the parties." [605] Hence, while records may be admitted in evidence in suits not between the same parties or privies, where, upon the facts of the trial and the recoveries in such records, the interests of others hang as incidents or consequences, and the production of such a record is proof that the suit was brought and the recovery had as therein set forth, yet the consequences to

[604] Littleton v. Richardson, 34 N. H. 179, 66 Am. Dec. 759; Smith v. Chapin, 31 Conn. 530; Ansley v. Carlos, 9 Ala. 973; Taylor v. Means, 73 Ala. 468; McCamant v. Roberts, 66 Tex. 260, 1 S. W. 260; Southern R. Co. v. Bouknight, 17 C. C. A. 181, 70 Fed. 442, 30 L. R. A. 823; Gillett v. Landis, 17 La. 470; Harrington v. Wadsworth, 63 N. H. 400; Key v. Dent, 14 Md. 86; Stephens v. Jack, 3 Yerg. (Tenn.) 403, 24 Am. Dec. 583; Maple v. Beach, 43 Ind. 51; Koren v. Roemheld, 7 Ill. App. 646.

[605] Spencer v. Dearth, 43 Vt. 98, 105.

others, resulting from those facts apparent from the face of the record, are to be established by appropriate evidence of such other facts as may be necessary to sustain the action or defense.[606] The record of the judgment, for example, is the only legitimate evidence of the termination of a cause.[607] And so when the money sought to be recovered under a count for money paid has been paid under a judgment against the plaintiff, the record of the judgment is always admissible to prove the fact of the judgment and the amount so recovered.[608] Where the plaintiff in ejectment claims through the heir of a decedent, the record of a partition suit between the heirs of such person, which showed that there had been a final decree of the court for a partition of the land, is admissible in evidence.[609] A judgment against a sheriff, on a rule by a judgment-creditor for failing to make money, is evidence, in a subsequent action by a junior judgment-creditor not a party to the former rule, only of the fact that such a judgment was rendered and of its amount.[610] It is also held that a judgment obtained under the mechanics' lien law is conclusive, as to the facts recited therein, in determining the priority of such judgment over another judgment against the same debtor.[611] So, when the action is by a receiver, he may give in evidence, even against a stranger, the decree by which he was appointed, for the purpose of showing his right to sue as receiver and that the subject of the present litigation was committed to him in his character of receiver.[612] But as already stated, the judgment is not admissible evidence, against strangers, of the grounds on which the recovery was had. It is only the fact of the adjudication which can be thus proved.[613]

[606] Key v. Dent, 14 Md. 86.

[607] Baker v. Dellesseline, 4 McCord (S. C.) 372.

[608] Love v. Gibson, 2 Fla. 598, 616. See, also, Walsh v. Ostrander, 22 Wend. (N. Y.) 178; Atkinson v. Parks, 84 Me. 414, 24 Atl. 891.

[609] Shanks v. Lancaster, 5 Grat. (Va.) 110, 50 Am. Dec. 108. And see Burdick v. Chicago, M. & St. P. Ry. Co., 87 Iowa, 384, 54 N. W. 439.

[610] Anderson v. Bright, 12 Ala. 478.

[611] Naylor v. Mettler (N. J.) 11 Atl. 859. Compare Hartman v. Welland, 36 Minn. 223, 30 N. W. 815.

[612] Hardwick v Hook, 8 Ga. 354; Goodhue v. Daniels, 54 Iowa, 19, 6 N. W. 129.

[613] Lloyd v. Tracy, 53 Mo. App. 175; Falconer v. Cochran, 68 Minn 495, 71 N. W. 386; Landauer v. Espenhain, 95 Wis. 169, 70 N. W. 287.

Hence, for example, the record of a conviction for an assault and battery committed by a husband upon his wife, is evidence, in an action by the wife for a divorce, only of the fact of the conviction, and not that the assault and battery alleged was actually committed.[614] So again, one who is not a party to a suit in which it is decided that his vendor made a fraudulent sale to him is not thereby precluded from showing, in a subsequent action, that he purchased the property from his vendor in good faith and for a full consideration, and had exclusive possession before other creditors obtained a lien.[615] But it is held that a judgment that A. is entitled to a certain fund is an adjudication that other claimants were not entitled to an injunction which they had obtained to prevent him from suing for the fund.[616]

As a general rule, when a judgment is offered in evidence as an estoppel, or to prove a particular judicial result, it is essential that the whole record should be shown. That is, not merely the entry of the judgment, but all the preliminary conditions to its rendition, must be made part of the offer.[617] But there are cases where this rule will be relaxed, so far as to admit a part only of the record, where the mere existence of that part is the one fact sought to be established by its production. Thus, where a record is offered in evidence to show the fact that there is a judgment, the object being to support an execution under such judgment, it is not necessary that the entire record should be put in evidence; a transcript of so much of the record as will show the existence of the judgment under which the execution issued may be received in evidence, in cases of this character.[618]

[614] Quinn v. Quinn, 16 Vt. 426.

[615] Snyder v. Berger (Pa.) 9 Atl. 147.

[616] Heyman v. Landers, 12 Cal. 107. And see Ilg v. Burbank, 59 Ill. App. 291; Scott v. Hall (N. J.) 46 Atl. 611; McDonald v. Hannah (C. C.) 51 Fed. 73.

[617] 1 Whart. Ev. § 824.

[618] Lee's Adm'x v. Lee, 21 Mo. 531, 64 Am. Dec. 247; 1 Whart. Ev. § 828. See Young v. Harrison, 21 Ga. 584; Whitmore v. Johnson's Heirs, 10 Humph. (Tenn.) 610.

§ 605. Judgment as Evidence of Relation of Debtor and Creditor.

One of the most important applications of the rule giving a qualified admissibility to a judgment as evidence against strangers, is in the case where it is invoked as proof of the relationship of debtor and creditor between the parties. It is now well settled upon high authority that where no fraud or collusion has been shown in the recovery of a judgment, such judgment is conclusive of the fact and the amount of the indebtedness of the judgment-debtor, and it cannot be collaterally impeached by third persons in a subsequent suit where such indebtedness is called in question.[619] Thus, in an action against two defendants to set aside a deed of land from one to the other as a fraud upon the plaintiffs as creditors of the vendor, the record of a recovery by the plaintiffs against such grantor is conclusive evidence against him that he owed the amount of it when the suit was brought; and it is prima facie evidence of the same fact against the vendee, upon proof being made of the facts stated in the complaint in such action, as the cause of action therein.[620] So the judgment recovered in an attachment suit is admissible in evidence in a suit brought against the sheriff, as proof of the existence of the debt of the attaching creditor.[621] And a judgment obtained without fraud

[619] Strong v. Lawrence, 58 Iowa, 56, 12 N. W. 74; Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294; Voorhees v. Seymour, 26 Barb. (N. Y.) 569; Mowry v. Davenport, 6 Lea (Tenn.) 80; First Nat. Bank v. Oldham, 6 Lea (Tenn.) 718; Cox v. Thomas' Adm'x, 9 Grat. (Va.) 323; Raymond v. Richmond, 78 N. Y. 351; Sidensparker v. Sidensparker, 52 Me. 481, 83 Am. Dec. 527; Ledoux v. Bank of America, 24 App. Div. 123, 48 N. Y. Supp. 771; Moore & Handley Hardware Co. v. Curry, 106 Ala. 284, 18 South. 46; Bain v. Wells, 107 Ala. 562, 19 South. 774; Bensimer v. Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774; Pabst Brewing Co. v. Jensen, 68 Minn. 293, 71 N. W. 384; Mosgrove v. Harris, 94 Cal. 162, 29 Pac. 490. Where a distress warrant for rent is levied on goods found on the leased premises, and the landlord recovers in the action, the judgment is, in the absence of fraud or collusion, conclusive evidence of the rent due when the writ issued, as against a third person who claims the goods and sues for their conversion. Conwell v. Hartsell (Tex.) 16 S. W. 541; Lehman v. Stone (Tex.) 16 S. W. 784.

[620] New York & Harlem R. Co. v. Kyle, 5 Bosw. (N. Y.) 587; Vogt v. Ticknor, 48 N. H. 242; Church v. Chapin, 35 Vt. 231; Inman v. Mead, 97 Mass. 310; Goodnow v. Smith, Id. 69; Alkire Grocery Co. v. Richesin (C. C.) 91 Fed. 79. Per contra, Troy v. Smith, 33 Ala. 469.

[621] Rinchey v. Stryker, 28 N. Y. 45, 84 Am. Dec. 324.

or collusion is conclusive evidence, in suits between creditors in relation to the property of the debtor, of the fact and amount of the indebtedness of the latter.[622] Where a person has been compelled by a judgment or decree to pay over moneys in his hands, the record of the judgment or decree may be given in evidence by him, in a subsequent suit against him, for the recovery of the same money, by one who was not a party to the former proceeding, for the purpose of proving that he has so paid over such money by order of a competent tribunal.[623]

§ 606. Judgment as Evidence of Facts Provable by General Reputation.

"It is true as a general rule that a judgment or decree only binds parties and privies, and that, as against strangers, the record is only evidence of the fact that the judgment or decree has been pro-

[622] Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294. In this case, in delivering the opinion of the court, Gardiner, J., observed: "In creating debts, or establishing the relation of debtor and creditor, the debtor is accountable to no one unless he acts mala fide. A judgment, therefore, obtained against the latter without collusion is conclusive evidence of the relation of debtor and creditor against others: First, because it is conclusive between the parties to the record, who in the given case have the exclusive right to establish it; and second, because the claims of other creditors upon the debtor's property are through him, and subject to all previous liens, preferences, or conveyances made by him in good faith. Any deed, judgment, or assurance of the debtor, so far at least as they conclude him, must estop his creditors and all others. Consequently neither a creditor nor stranger can interfere in the bona fide litigation of the debtor, or retry his cause for him, or question the effect of the judgment as a legal claim upon his estate. A creditor's right, in a word, to impeach the act of his debtor does not arise until the latter has violated the tacit condition annexed to the debt, that he has done and will do nothing to defraud his creditors. Where, however, fraud is established, the creditor does not claim through the debtor but adversely to him, and by a title paramount, which overreaches and annuls the fraudulent conveyance or judgment by which the latter himself would be estopped. It follows from the principles suggested that a judgment obtained without fraud or collusion, and which concludes the debtor, whether rendered upon default, confession, or after contestation, is upon all questions affecting the title to his property conclusive evidence against his creditors to establish, first, the relation of creditor and debtor, between the parties to the record, and second, the amount of the indebtedness."

[623] Barkaloo's Adm'r v. Emerick, 18 Ohio, 268. And see Dempsey v. Schawacker, 140 Mo. 680, 38 S. W. 954.

nounced, and of the legal consequences resulting from that fact. But there is a class of cases in which the judgment or decree is prima facie evidence against third persons of a fact that was necessarily found thereby. Where a fact may be established by proof of general reputation, such as custom, prescription, pedigree, or the like, the record of a judgment or decree finding the same fact is prima facie evidence thereof against third persons. The solemn adjudication of a court upon testimony is justly regarded as stronger proof of the fact than mere evidence of general reputation."[624] For example, it is competent to prove by general reputation that a person is dead; and hence a decree against the unknown heirs of such person, since it could not have been made without proof of his death, is admissible evidence of that fact.[625] On the same ground, the judgment is competent when the issue turns upon a question of pedigree.[626] Again, a right of ferry is a matter in which the public are interested, and as to which, for that reason, reputation is evidence, and so also is a verdict or judgment of a court of competent jurisdiction, touching the same right, although between other parties.[627] A former judgment in an action by the same plaintiff against a third person is admissible in evidence as tending to establish the plaintiff's right of free warren in a copyhold estate, where that question was at issue in the former action.[628] So also, in a case where the matter in controversy was the freedom or slavery of the plaintiff, it was held unobjectionable to receive in evidence the record of a judgment between strangers to the present

[624] Pile v. McBratney, 15 Ill. 314; Brisco v. Lomax, 8 Adol. & E. 198; Evans v. Rees, 10 Adol. & E. 151; Patterson v. Gaines, 6 How. 599, 12 L. Ed. 553; Chirac v. Reinecker, 2 Pet. 613, 7 L. Ed. 538; Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 98; Reed v. Jackson, 1 East, 355; Pim v. Curell, 6 Mees. & W. 266; Carnarvon v. Villebois, 13 Mees. & W. 313; 1 Starkie, Ev. 251; 1 Greenl. Ev. § 555; 1 Whart. Ev. § 200. But although verdicts and judgments are, upon authority, admitted as proof of reputation, the rule does not extend to awards. Evans v. Rees, 10 Adol. & E. 151.

[625] Pile v. McBratney, 15 Ill. 314.

[626] Chirac v. Reinecker, 2 Pet. 613, 7 L. Ed. 538. But see Chamberlain v. City of New Orleans, 48 La. Ann. 1055, 20 South. 169; Eisenlord v. Clum, 126 N. Y. 552, 27 N. E. 1024, 12 L. R. A. 836; Freeman v. Hawkins, 77 Tex. 498, 14 S. W. 364, 19 Am. St. Rep. 769.

[627] Pim v. Curell, 6 Mees. & W. 234.

[628] Carnarvon v. Villebois, 13 Mees. & W. 313.

action, establishing the right to freedom of a maternal aunt of the plaintiff; because hearsay evidence of that fact would have been competent and admissible.[629]

§ 607. Judgment as Link in Chain of Title

A judgment at law or decree in equity, when it constitutes a link in a chain of title, is competent and admissible evidence, in that character and for that purpose, not only against the parties to the record but against all the world.[630] Thus a decree of the court, authorizing the marshal to make a deed of the land in question, is admissible in evidence for a stranger to that proceeding when a necessary link in his chain of title.[631] So in ejectment by a sheriff's vendee, a judgment in favor of the vendee against the defendant as whose property the land was sold, is pertinent testimony, because it shows the manner in which the sheriff was paid for the land.[632] Again, on a trial touching the right to lands, decrees in chancery between other parties, concerning the same lands, are admissible in evidence to show the character in which the possessor holds the premises.[633] But this exception to the general rule must be carefully confined to its legitimate boundaries. Not every judgment affecting the title to land is admissible evidence in a suit between strangers. To have that quality the adjudication must constitute an actual and necessary part of the chain of title alleged by the party who offers it. Thus, in a writ of entry, the plaintiff cannot, for the purpose of rebutting the defendant's evidence, introduce in evidence

[629] Vaughan v. Phebe, 1 Mart. & Y. (Tenn.) 5, 17 Am. Dec. 770.

[630] Webb v. Den, 17 How. 577, 15 L. Ed. 35; Barr v. Gratz, 4 Wheat. 213, 4 L. Ed. 553; Bussey v. Dodge, 94 Ga. 584, 21 S. E. 151; Kurtz v. St. Paul & D. R. Co., 61 Minn. 18, 63 N. W. 1; Railroad Equipment Co. v. Blair, 145 N. Y. 607, 39 N. E. 962; Turpin v. Brannon, 3 McCord (S. C.) 261; Fowler v. Savage, 3 Conn. 90; Chamberlain v. Bradley, 101 Mass. 188, 3 Am. Rep. 331; Martin v. Rutt, 127 Pa. 380, 17 Atl. 993; Baylor's Lessee v. Dejarnette, 13 Grat. (Va.) 152; Cravens v. Jameson, 59 Mo. 68; Gage v. Goudy, 141 Ill. 215, 30 N. E. 320; Bowe v. McNab, 11 App. Div. 386, 42 N. Y. Supp. 938; Building, Light & Water Co. v. Fray, 96 Va. 559, 32 S. E. 58; Skelly v. Jones, 33 Misc. Rep. 304, 68 N. Y. Supp. 422.

[631] Masters v. Varner's Ex'rs, 5 Grat. (Va.) 168, 50 Am. Dec. 114.

[632] Hartman v. Stahl, 2 Pen. & W. (Pa.) 223.

[633] Davies v. Lowndes, 1 Bing. N. C. 597, 607.

the verdict and judgment in an action of trespass, relative to the same land, brought by a person through whom the plaintiff does not derive title, in which action judgment was rendered against the same defendant.[634] So again, where A. and B. are the only parties to a suit affecting the title to one of several tracts of land conveyed by a quitclaim, a judgment in that suit declaring the deed to be void is, as to C. and D., neither of the latter being privies with A. or B., simply res inter alios acta, and in a suit by C. against D. to quiet title to another of the tracts covered by the quitclaim, it is not binding as res judicata.[635]

§ 608. Judgment as an Admission.

Strictly speaking, a judgment against a party, since it proceeds in invitum, cannot properly be considered as his admission. Yet there are cases where a stranger may put forward the record of a judgment against his antagonist, and rely upon it as evidence in his own favor, not on the ground of any of the rules above mentioned, but because, in the circumstances, it partakes of the character of an admission. Statements and allegations made in the pleadings of a party will furnish a familiar illustration of this principle, but these fall without the scope of our present discussion, as we are only concerned with final adjudications. However, it is well settled upon the authorities, that a judgment by default, since it confesses the material facts well pleaded in the declaration, may be received in evidence, in behalf of a third person, as a species of admission of such facts, whenever proper and relevant.[636] But in such case it is not conclusive, possessing no other weight or dignity than attaches to any other kind of admission.

[634] Fogg v. Plumer, 17 N. H. 112.

[635] McClung v. Steen (C. C.) 32 Fed. 373.

[636] Ellis v. Jameson, 17 Me. 235; Cragin v. Carleton, 21 Me. 492; St. Louis Mut. Life Ins. Co. v. Cravens, 69 Mo. 72; Central R. & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353.

PART V. WHAT POINTS AND QUESTIONS ARE CONCLUDED.

§ 609. Scope of the Estoppel.

It is a fundamental and unquestioned rule that a former judgment, when used as evidence in a second action between the same parties or their privies, is conclusive upon every question of fact which was directly involved within the issues made in such former action, and which is shown to have been actually litigated and determined therein.[637] Before proceeding to consider this rule in detail, it will be profitable to select from the multitude of cases on the subject some typical examples of its practical application. In a case in Texas, where the action was for the recovery of damages for breach of an alleged contract for the sale of land, the defendant pleaded that in an action brought by him against the plaintiff and others to quiet his title to the land in question, the said plaintiff, for an equitable defense, set up the contract in question and prayed for a specific performance, and that judgment was rendered against him; it was held that the judgment was conclusive against the plaintiff.[638] So the questions involved in a suit brought to establish a will as a lost or destroyed will, and in a subsequent action of partition between the same parties where such will is sought to be so established by one claiming under it, are identical. The same proof is required, to establish the will, in either case, and the question having been once passed upon by a competent tribunal must be deemed at rest and the former judgment conclusive.[639] Again, in a suit upon an appeal-bond given by the defendant to a

[637] Morse v. Elms, 131 Mass. 151; Barber v. Kendall, 158 N. Y. 401, 53 N. E. 1; Bulkly v. Healy, 58 Hun, 608, 12 N. Y. Supp. 54; Diehl v. Marchant, 87 Va. 447, 12 S. E. 803; Hurst v. Combs (Ky.) 14 S. W. 378; Courier-Journal Job Printing Co. v. Columbia Fire Ins. Co. (Ky.) 54 S. W. 966; City of Cincinnati v. Hosea, 19 Ohio Cir. Ct. R. 744; Reynolds v. Mandel, 175 Ill. 615, 51 N. E. 649; Jenkinson v. Wysner, 125 Mich. 89, 83 N. W. 1012; Allis v. Davidson, 23 Minn. 442; McClung v. Condit, 27 Minn. 45, 6 N. W. 399; Prendergast v. Searle, 81 Minn. 291, 84 N. W. 107. And see supra, § 504, and cases there cited.

[638] Parnell v. Hahn, 61 Cal. 131.

[639] Harris v. Harris, 36 Barb. (N. Y.) 88. See, also, Vaughn v. Drewry, 79 Ga. 761, 4 S. E. 879.

landlord's action to recover the premises for non-payment of rent, a judgment in said action for possession, and that a certain amount of rent is in arrear, is conclusive upon the tenant as to the amount then due.[640] A conditional judgment on a writ of entry to foreclose a mortgage is conclusive evidence of the amount then due on the mortgage, in a subsequent suit in equity to redeem the land.[641] So again, where a husband is induced to execute a deed of certain property to his wife, on account of the marital relations between them, and afterwards the wife, on evidence furnished by herself, secures an annulment of the marriage on the ground that the husband was insane at the time the marriage contract was entered into, she cannot deny the insanity of the husband in an action brought to set aside the deed on account of such insanity.[642]

The exact scope of an estoppel by judgment may be made more clear by the statement of the following subsidiary rules:

1. It is not material whether the scope of the former action (in which the judgment in question was rendered) was wider or narrower than that of the present suit. For instance, the fact that, in the former action, additional property was involved does not affect the conclusiveness of the judgment upon the property involved in the suit on trial.[643]

2. It does not in the least affect the case that the party comes to the second trial armed with additional or different evidence upon the same question, which he did not present when it was before in controversy. If the point was once in issue and was actually determined by a competent court, that is enough; he is estopped to litigate it further.[644]

[640] Morris v. Horrell, 35 Mo. 467. See, further, Sipe v. Holliday, 62 Ind. 4.

[641] Sparhawk v. Wills, 5 Gray (Mass.) 423; Burke v. Miller, 4 Gray (Mass.) 114. See Jamaica Pond Aqueduct Corp. v. Chandler, 121 Mass. 1.

[642] Warfield v. Warfield, 76 Iowa, 633, 41 N. W. 383.

[643] Rucker v. Steelman, 97 Ind. 222; Peterson v. Warner, 6 Kan. App. 298, 50 Pac. 1091; Dyer v. Cranston Print Works, 21 R. I. 63, 41 Atl. 1015. Compare Starling v. Weir Plow Co. (C. C.) 49 Fed. 637.

[644] Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; Shoe Machinery Co. v. Cutlan (1896) 1 Ch. 667; Dubois v. Philadelphia, W. & B. R. Co., 5 Fish. Pat. Cas. 208, Fed. Cas. No. 4,109; Bailey v. Laws, 3 Tex. Civ. App. 529, 23 S. W. 20; Grunert v. Spalding (Wis.) 78 N. W. 606.

3. The estoppel of a judgment extends only to the facts as they were at the time the judgment was rendered, and to the legal rights and relations of the parties as fixed by the facts so determined. When new facts intervene before the second suit, furnishing a new basis for the claims and defenses of the parties respectively, the issues are no longer the same, and consequently the former judgment cannot be invoked as an estoppel.[645] But the change of facts will not affect the estoppel, if no new element is introduced, and the legal rights or relations of the parties remain as before.[646]

4. Though two distinct pieces of property, or two distinct kinds of property, or two separate claims or rights, may be involved in the two suits, yet if the right or title of a party to such property or claims rests upon one and the same common instrument or source of title, and the validity of his title or claim was directly adjudicated in the first suit, it is an estoppel in the second.[647]

5. It is immaterial that the questions alleged to have been settled by a former adjudication were determined in a different kind of proceeding, or a different form of action, from that in which the estoppel is set up,[648] provided, of course, that the parties and the issues are the same.

[645] Memphis City Bank v. State of Tennessee, 161 U. S. 186, 16 Sup. Ct. 468, 40 L. Ed. 664; Martin v. Walker, 43 La. Ann. 1019, 10 South. 365; Reynolds v. Ætna Life Ins. Co., 160 N. Y. 635, 55 N. E. 305; State v. Eagle Ins. Co., 50 Ohio St. 252, 33 N. E. 1056; Shepherd v. Willis, 19 Ohio, 142; Ligare v. Chicago, M. & N. R. Co., 166 Ill. 249, 46 N. E. 803; Village of Wayzata v. Great Northern Ry. Co., 67 Minn. 385, 69 N. W. 1073; Ryan v. Town of Sumner, 17 Wash. 228, 49 Pac. 487; Wright v. City of Cincinnati, 6 Ohio N. P. 450; Irish-American Bank v. Ludlum, 56 Minn. 317, 57 N. W. 927.

[646] Canal & C. R. Co. v. Crescent City R. Co., 47 La. Ann. 314, 16 South. 844; Broussard v. Broussard, 43 La. Ann. 921, 9 South. 910; Rarey v. Lee, 7 Ind. App. 518, 34 N. E. 749.

[647] Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; New Orleans v. Citizens' Bank of Louisiana, 167 U.

[648] Andrews Bros. Co. v. Youngstown Coke Co., 30 C. C. A. 293, 86 Fed. 585; State of New Jersey v. Boller (C. C.) 47 Fed. 415; Beach v. City of Elmira, 58 Hun, 606, 11 N. Y. Supp. 913; McNeely v. Hyde, 46 La. Ann. 1083, 15 South. 167; McCord-Collins Commerce Co. v. Levi, 21 Tex. Civ. App. 109, 50 S. W. 606; Carbiener v. Montgomery, 97 Iowa, 659, 66 N. W. 900; Seattle Nat. Bank v. School Dist., 20 Wash. 368, 55 Pac. 317.

6. But where a second action between the same parties is upon a claim or demand different from that involved in the first action, the judgment in such first action operates as an estoppel only as to those matters in issue, or points controverted, upon the determination of which the finding or verdict was rendered; it is not conclusive as to other matters which might have been, but were not, litigated or decided.[649]

7. The force of the estoppel resides in the judgment itself. It is not the finding of the court, or the verdict of the jury rendered in an action, which concludes the parties in subsequent litigation, but the judgment entered thereon.[650] And while it is proper for a court, in rendering judgment, to state the grounds on which it acted, it is error for the court to state the extent to which the judgment may or may not prejudice the rights of the parties in prosecuting other actions.[651] On the same principle, the reasons given by an appellate court for affirming a judgment are not an estoppel binding on the parties, as the conclusiveness of a judgment springs from the judgment itself and not from the reasons of the court in pronouncing it.[652]

S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; Baxter v. Myers, 85 Iowa, 328, 52 N. W. 234, 39 Am. St. Rep. 298; Thayer v. Cable, 19 App. Div. 558, 46 N. Y. Supp. 850; Watson v. Richardson, 110 Iowa, 698, 80 N. W. 416, 80 Am. St. Rep. 331; Freeman v. Barnum, 131 Cal. 386, 63 Pac. 691, 82 Am. St. Rep. 355; Robb v. Van Horn, 150 Pa. 508, 24 Atl. 756. Compare West v. Cole (Tex. Civ. App.) 50 S. W. 151; Hart v. Moulton, 104 Wis. 349, 80 N. W. 599, 76 Am. St. Rep. 881.

[649] Dennison v. United States, 168 U. S. 241, 18 Sup. Ct. 57, 42 L. Ed. 453; Fidelity Trust & Safety-Vault Co. v. City of Louisville, 174 U. S. 429, 19 Sup. Ct. 875, 43 L. Ed. 1034; Linton v. National Life Ins. Co., 44 C. C. A. 54, 104 Fed. 584; Union Mill & M. Co. v. Dangberg (C. C.) 81 Fed. 73; Geneva Nat. Bank v. Independent School Dist. (C. C.) 25 Fed. 629; Duncan v. Holcomb, 26 Ind. 378; Spurlock v. Missouri Pac. Ry. Co., 76 Mo. 67; People v. Johnson, 37 Barb. (N. Y.) 502; Burdick v. Post, 12 Barb. (N. Y.) 168; Scully v. Lowenstein, 56 Miss. 652; Lord v. Thomas (Cal.) 36 Pac. 372.

[650] Denike v. Denike, 44 App. Div. 621, 60 N. Y. Supp. 110.

[651] Prondzinski v. Garbutt, 9 N. D. 239, 83 N. W. 23; Holland v. Preston (Tex. Civ. App.) 41 S. W. 374.

[652] Citizens' Bank v. Brigham, 61 Kan. 727, 60 Pac. 754.

§ 610. The Four Identities.

What, then, are the conditions under which a judgment rendered in one action will be receivable as conclusive evidence in a subsequent action? According to a certain line of authorities, "in order to make a matter res judicata there must be a concurrence of the four conditions following, namely: 1. Identity in the thing sued for [or subject-matter of the suit]. 2. Identity of the cause of action. 3. Identity of persons and of parties to the action. 4. Identity of the quality in the persons for or against whom the claim is made." [653] As to the last two of these "identities" there can of course be no question. That a judgment is in general conclusive only between parties and privies,[654] and that it binds a person only in the character in which he appears,[655] are principles which have been stated and illustrated in an earlier part of this chapter. But in regard to the two former requisites, as above enumerated, the decisions exhibit considerable doubt and ambiguity. This arises, in part at least, from a failure to observe properly the very important distinction already pointed out, between the case of a judgment offered as evidence of some particular question which was adjudicated in a former controversy, and the case where a judgment is set up as a bar to the maintenance of the action or as a merger of the cause of action. In the latter case, it is undoubtedly correct to say that there must be an identity of the subject-matter, for it is precisely because the cause of action is the same that it cannot be tried a second time. But it often happens that some one point (such as the employment of an agent) may be put in issue in two suits between the same parties, in which, nevertheless, the causes of action are as widely different as it is possible to imagine them; and the first judgment will be held conclusive of that point in the second suit. It is therefore necessary to amend the statement of

[653] Bouv. Law Dict., "Res Judicata;" State v. Jumel, 30 La. Ann. 861; Benz v. Hines, 3 Kan. 397, 89 Am. Dec. 594; Semple v. Scarborough, 44 La. Ann. 257, 10 South. 860; State v. Kaye, 83 Mo. App. 678; Mershon v. Williams, 63 N. J. 398, 44 Atl. 211.

[654] Supra, § 534.

[655] Supra, § 536; Huyghe v. Brinkman, 34 La. Ann. 1179.

what is requisite to the rule of res judicata in order to adapt it to the case of a judgment produced as evidence of a particular proposition, which is the subject of the present chapter. Instead of the first two "identities" above mentioned, we propose, for the present purpose, to substitute the following: There must be an identity of issues.[656] And by this is meant that the issue raised in the second suit, upon which the evidential force of the former judgment is to be directed, must be identical with the issue (or one of the issues) raised and determined in the first action. We are thus brought down to the leading question for the present sub-division of our subject, viz.: what are these "matters in issue" upon which the former judgment is conclusive? But before attempting a direct answer to this question, it will be advisable to narrow the field of inquiry as much as possible. And so we shall be led to see, in the first place, that we are to exclude all such matters as come only incidentally or collaterally into the controversy and such as can only be deduced by a process of argument and inference from the form or character of the judgment.

§ 611. Matters Incidentally Considered.

The rule has always been regarded as well settled, from the earliest authorities down to the present time, that the judgment, either of a court of concurrent jurisdiction or of a court of exclusive jurisdiction, is not conclusive of any matter which was incidentally cognizable in that action, or which came collaterally in question, nor of any matter to be inferred by argument and construction from the judgment.[657] "The estoppel of a judgment ex-

[656] See Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195; City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202; Police Jury of Jefferson v. United States, 8 C. C. A. 607, 60 Fed. 249; Norton v. Jensen, 33 C. C. A. 141, 90 Fed. 415; Rocker Spring Co. v. William D. Gibson Co. (C. C.) 58 Fed. 217; Gallagher v. Kingston Water Co., 164 N. Y. 602, 58 N. E. 1087; Gregg v. Page Belting Co., 69 N. H. 247, 46 Atl. 26; Smith v. Smith, 55 S. C. 507, 33 S. E. 583; West Chicago Park Com'rs v. Farber, 171 Ill. 146, 49 N. E. 427; Bachman v. Schertz, 73 Ill. App. 479; Thomas v. McDanald, 102 Iowa, 564, 71 N. W. 572; Bierman v. Crecelius, 135 Mo. 386, 37 S. W. 121; Lawless v. Lawless, 47 Mo. App. 523; Thompson v. Crosby, 62 Minn. 324, 64 N. W. 823.

[657] Duchess of Kingston's Case, 20 How. St. Tr. 538; Hopkins v. Lee, 6

tends only to the question directly involved in the issue, and not to any incidental or collateral matter, though it may have arisen and been passed upon." [658] "The principle upon which judgments are held conclusive upon the parties, requires that the rule should apply only to that which was directly in issue, and not to everything which was incidentally brought into controversy during the litigation." [659] For example, upon an application by an executor or administrator to the probate court for an order to sell land for the payment of debts, which application is contested by the heirs or devisees, the liability of the personal representative himself to the estate, for the rent of lands before or after the death of the decedent, may become matter of controversy on the trial, as affecting the amount of assets liable for debts, since the existence of such liability, if shown, would be evidence of personal assets primarily chargeable with the debts. Yet this is not the matter in issue in such controversy; it is merely incidental or collateral matter, within the rule above stated, and the decree is not conclusive as to that question on final settlement of the executor's account.[660] So again,

Wheat. 109, 5 L. Ed. 218; Howard v. Kimball, 65 Me. 308; Hotchkiss v. Nichols, 3 Day (Conn.) 138; Kennedy v. Scovil, 14 Conn. 61; Dickinson v. Hayes, 31 Conn. 417; Eastman v. Cooper, 15 Pick. (Mass.) 276, 26 Am. Dec. 600; Gilbert v. Thompson, 9 Cush. (Mass.) 348; Jennison v. Inhabitants of West Springfield, 13 Gray (Mass.) 544; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Lawrence v. Hunt, 10 Wend. (N. Y.) 80, 25 Am. Dec. 539; Lance v. Shaughnessy, 86 Hun, 411, 33 N. Y. Supp. 515; Tams v. Lewis, 42 Pa. 402; Stevenson v. Kleppinger, 5 Watts (Pa.) 420; Blackmore v. Gregg, 10 Watts (Pa.) 222, 36 Am. Dec. 171; Lentz v. Wallace, 17 Pa. 412, 55 Am. Dec. 569; Forcey's Appeal, 106 Pa. 508; Brady v. Pryor, 69 Ga. 691; Watts v. Rice, 75 Ala. 289; Land v. Keirn, 52 Miss. 341; Union & Planters' Bank v. Allen, 77 Miss. 442, 27 South. 631; Faires v. McLellan (Tex. Civ. App.) 24 S. W. 365; Miehle Printing Press & Mfg. Co. v. Andrews-Jones Printing Co., 18 Ohio Cir. Ct. R. 158; Shall v. Biscoe, 18 Ark. 142; Wahle v. Wahle, 71 Ill. 510; Smith v. Rountree, 185 Ill. 219, 56 N. E. 1130; Ryan v. Potwin, 62 Ill. App. 134; Zabel v. Harshman, 68 Mich. 273, 42 N. W. 44; Wilson v. Stripe, 4 G. Greene (Iowa) 551, 61 Am. Dec. 138; Haight v. City of Keokuk, 4 Iowa, 199; Ridgley v. Stillwell, 27 Mo. 128; Fish v. Lightner, 44 Mo. 268; Henry v. Davis, 13 W. Va. 230; Fulton v. Hanlow, 20 Cal. 450; Chapman v. Hughes (Cal.) 60 Pac. 974; King v. Brigham, 23 Or. 262, 31 Pac. 601, 18 L. R. A. 361.

[658] Lewis' Appeal, 67 Pa. 153.

[659] Horton v. Hamilton, 20 Tex. 606.

[660] Ford v. Ford's Adm'r, 68 Ala. 141.

where A., in January, sold to B. a city lot, and in March sold him an adjoining lot, and, in an action to recover the purchase-money under the agreement of March, the defense of payment was set up, and as evidence of this a deed of both lots was offered and a delivery of the deed sought to be established, and the jury found for the defendant, it was held that the delivery of the deed was not in issue in that case within the meaning of the rule, so as to require the court, in an action of covenant on the agreement of January, to take from the jury the question of delivery of the deed.[661] To take another illustration, a verdict and judgment in an action of trespass de bonis asportatis, where the plea was not guilty and the ownership of the goods depended upon the title to land, is no estoppel to an action for the possession of the same land between the same parties.[662] So where, in an action for damages for trespass to land, the plaintiff relies for title upon certificates of purchase issued by the state, and the defendant puts in issue the plaintiff's title, if the plaintiff recovers judgment, it is no bar to an action by the defendant against the plaintiff to determine which of them has the better right to purchase the land from the state.[663] So where the respondent in a petition in involuntary bankruptcy took issue on the question of his insolvency, and the petitioning creditor, for the purpose of proving insolvency, offered in evidence certain promissory notes made by the debtor to third parties, and the debtor contested their validity and consideration, but the court found the allegations of the petition to be true and made an adjudication of bankruptcy, it was held that, as such notes were not directly in issue, but only collaterally brought in question, and as the holders thereof were not parties to the proceeding, the adjudication of bankruptcy was not conclusive as to their validity, and would not preclude the bankrupt from opposing their allowance as claims against his estate.[664]

An important analogy to the rule under consideration is found in the case of opinions of the appellate courts considered as au-

[661] Cavanaugh v. Buehler, 120 Pa. 441, 14 Atl. 391.
[662] Potter v. Baker, 19 N. H. 166.
[663] Bosquett v. Crane, 51 Cal. 505.
[664] In re Henry Ulfelder Clothing Co. (D. C.) 98 Fed. 409.

thoritative statements of the law. A point may be considered and passed upon by the court which comes only incidentally in question and is not necessary to the determination of the case. In that event, the decision, so far as concerns that point, is merely obiter dictum and not entitled to the weight of a precedent. But where the record in an action of which the court has jurisdiction fairly presents two points, upon either of which the decision might turn, and the court fully considers and determines both, the decision of neither can be considered as an obiter dictum, and the judgment is authoritative on both points.[665]

§ 612. Inferences from the Judgment.

The second branch of the rule in question,—that a prior adjudication is not conclusive as to matters which can only be inferred by argument from the judgment,—is not illustrated by so great a number of decisions as the former part, but it is not less important nor less firmly established.[666] A decree of distribution of an estate, for example, necessarily involves the determination of the fact that all the distributees are living, but only incidentally so, as the basis of the decree; the decree is therefore not conclusive of such fact, but it may be proved by any one whose interest warrants it that one or more of the distributees were dead at the date of the decree, and it makes no difference that the decree recites their presence.[667] So where the first suit was for necessaries furnished to a wife, and the second was for boarding the wife and child, and the record of the first suit did not show whether the husband and wife were cohabiting at the time, it was held that, since that fact was not directly

[665] Hawes v. Contra Costa Water Co., 5 Sawy. 287, Fed. Cas. No. 6,235.

[666] Belleville & St. L. Ry. Co. v. Leathe, 28 C. C. A. 279, 84 Fed. 103; Mack v. Levy (C. C.) 60 Fed. 751; California & O. Land Co. v. Worden (C. C.) 85 Fed. 94; Mallett v. Foxcroft, 1 Story, 474, Fed. Cas. No. 8,989; Crandall v. Gallup, 12 Conn. 365; Darcy v. Kelley, 153 Mass. 433, 26 N. E. 1110; Watts v. Watts, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. Rep. 500; In re Thomas' Will, 111 N. C. 409, 16 S. E. 226; McCravey v. Remson, 19 Ala. 430, 54 Am. Dec. 194; Evans v. Birge, 11 Ga. 272; Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 South. 200; Gates v. Parmly, 93 Wis. 294, 66 N. W. 253.

[667] Sawyer v. Boyle, 21 Tex. 28; Eans v. Sawyer, 27 Tex. 448.

in issue in that suit, and could only be inferred by argument from the judgment, the record could not be used in the second suit to prove that the husband had turned away his wife.[668] The same principle furnished the rule for the decision in Williams v. Williams,[669]—a case which seems to push the doctrine as far as it can be legitimately extended. There a woman brought an action for divorce against A., alleging that they had been "duly and lawfully married" at a time and place named, and setting up desertion as a ground for the divorce. The defendant did not answer, and a decree was made for the plaintiff. In the meantime she had contracted a marriage with B., and after B.'s death, brought suit to recover dower in his lands. This was resisted, on the ground that she was the wife of A. at the time of her pretended marriage to B., and to show this the record of the divorce suit was put in evidence. But it was held that she was not estopped, by that record, from showing by other evidence that there never was any legal marriage between A. and herself, because, at the time of their supposed marriage, he had no capacity to contract marriage, having another wife living. The decision was based on the ground that the decree of divorce did not actually pass upon the validity of the marriage, and that its validity, so far as it entered at all into that decree, was a matter only incidentally cognizable or inferrible by argument from the judgment.

§ 613. Necessary Conditions to the Adjudication.

The rule stated in the preceding section cannot be fully comprehended and accurately applied unless we take into account the very important distinction between possible or probable inferences from the judgment and the necessary conditions to the adjudication. Necessary and inevitable inferences—facts without which the judgment could not have been rendered—are equally covered by the estoppel as if they were specifically found in so many words. "The estoppel is not confined to the judgment," says the supreme court of Massachusetts, "but extends to all steps involved in it as necessary steps

[668] Lentz v. Wallace, 17 Pa. 412, 55 Am. Dec. 569.
[669] 63 Wis. 58, 23 N. W. 110, 53 Am. Rep. 253.

or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis upon which it stands, upon the obvious principle that, where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion." [670] For example, where a plaintiff has recovered in an action of trespass quare clausum fregit, such recovery is conclusive, as between the parties, that the plaintiff's possession, before the trespass in that suit complained of, was peaceable, and prior to defendant's, and of such a character as to entitle the plaintiff to retake it if it could be done peaceably.[671] Again, where an action of tort was brought for damages for the obstruction of an easement, and, under a plea of not guilty, a recovery was had, plaintiff's right to the easement at that time was established as between the parties to the suit.[672] So, a decree for the specific performance by a railroad company of a contract by it to convey the lands granted to it is a conclusive adjudication that, at the time the suit was commenced, the full equitable title had passed under the contract.[673] So where the plaintiff

[670] Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733. And see Werlein v. City of New Orleans, 177 U. S. 390, 20 Sup. Ct. 682, 44 L. Ed. 817; Buchanan v. Knoxville & O. R. Co., 18 C. C. A. 122, 71 Fed. 324; Carter v. Couch, 28 C. C. A. 520, 84 Fed. 735; Perkins v. Walker, 19 Vt. 144; Duncan v. Bancroft, 110 Mass. 267; Kashman v. Parsons, 70 Conn. 295, 39 Atl. 179; Tuska v. O'Brien, 68 N. Y. 446; Conant v. Jones, 50 App. Div. 336, 64 N. Y. Supp. 189; Case v. Phœnix Bridge Co., 58 N. Y. Super. Ct. 435, 11 N. Y. Supp. 724; Dorris v. Erwin, 101 Pa. 239; School Dist. No. 28 v. Stocker, 42 N. J. Law, 115; Blake v. Ohio River R. Co., 47 W. Va. 520, 35 S. E. 953; Willis v. Tozer, 44 S. C. 1, 21 S. E. 617; Daniel v. Gum (Tenn.) 45 S. W. 468; Ashmead v. Hurt, 125 Ind. 566, 25 N. E. 709; Wright v. Griffey, 147 Ill. 496, 35 N. E. 732, 37 Am. St. Rep. 228; Nave v. Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; Hayes v. Shattuck, 21 Cal. 51; Stallcup v. City of Tacoma, 13 Wash. 141, 42 Pac. 541, 52 Am. St. Rep. 25. Further as to the distinction between matters necessarily determined by a judgment and matters which are only possibly or probably inferable from it, see Virginia-Carolina Chemical Co. v. Kirven, 57 S. C. 445, 35 S. E. 745; Commonwealth v. Order of Solon, 166 Pa. 33, 30 Atl. 930; Freeman v. Barnum, 131 Cal. 386, 63 Pac. 691, 82 Am. St. Rep. 355.

[671] Illinois & St. L. R. & Coal Co. v. Cobb, 82 Ill. 183.

[672] Manning v. Port Reading R. Co., 54 N. J. Eq. 46, 33 Atl. 802.

[673] Winona & St. P. Land Co. v. Minnesota, 159 U. S. 526, 16 Sup. Ct. 83, 40 L. Ed. 247.

recovers judgment in an action for damages for maintaining a causeway over the waters of a cove so as to obstruct access to plaintiff's land, the jury must have found that the waters of the cove were navigable, and the verdict renders that fact res judicata.[674] Again, where an injunction suit is brought on behalf of a county to enjoin the payment of a claim against it, and the court adjudges that defendant has a valid claim and is entitled to a warrant, this judgment is conclusive that the claimant has substantially complied with the statutory requirements.[675] So, a judgment against a city for an amount due on a contract cannot be defeated by showing that the contract was void as in violation of the constitutional limitation upon the power of municipalities to create indebtedness, such question being res judicata, whether raised on the trial or not.[676]

§ 614. What Constitutes the "Matter in Issue."

We have now seen that the estoppel of a judgment does not extend to such matters as come only incidentally or collaterally into the controversy, but only to points actually and necessarily adjudicated. In other words, that a former judgment is conclusive only as to the matters in issue or points in controversy, upon the determination of which the finding or verdict was rendered.[677] But what is the "matter in issue" within the meaning of this rule? Is the test to be furnished solely by the issues framed in the suit, or also by the course and nature of the evidence? Suppose that a question arises on the trial which, per se, has nothing to do with the cause of action and is not mentioned in the pleadings, but which materially affects the stated issue and must be determined before the issue can be found either way. Suppose further that such question, thus becoming necessary to the decision of the cause, is controverted between

[674] Sherman v. Sherman, 18 R. I. 504, 30 Atl. 459.

[675] State v. Headlee, 18 Wash. 220, 51 Pac. 369.

[676] Howard v. City of Huron, 6 S. D. 180, 60 N. W. 803.

[677] Smith v. Town of Ontario (C. C.) 4 Fed. 386; Billing v. Gilmer, 8 C. C. A. 645, 60 Fed. 332; House v. Lockwood, 137 N. Y. 259, 33 N. E. 595; Lythgoe v. Lythgoe, 75 Hun, 147, 26 N. Y. Supp. 1063; Ledoux's Heirs v. Lavedan, 49 La. Ann. 913, 22 South. 214; Neilson v. Pennsylvania Coal & Oil Co., 78 Minn. 113, 80 N. W. 859; McLeod v. Lee, 17 Nev. 103, 29 Pac. 124.

the parties, and is made the subject of evidence, argument, and instructions, and that its resolution in effect determines the verdict of the jury. Now is the question to be considered res judicata between the parties or not? Unfortunately, the authorities are in conflict upon this subject, and the matter rests in much doubt and confusion. There are cases holding that, in order that a former adjudication upon a particular point should be available as an estoppel, the fact determined must have been in issue on the face of the pleadings in the former proceeding.[678] This, however, is not good doctrine. For it frequently happens that the pleadings are so general as not to disclose the precise point litigated, and then, as we shall presently see, parol evidence is admissible to identify the issues really tried and determined. The most strict and technical view of the subject was taken in the case of King v. Chase,[679] where it was held that the matter in issue includes only that upon which the plaintiff proceeds in his action and which the defendant controverts by his pleadings, and not facts offered in evidence to establish the matters in issue, though they may be the only points controverted.[680]

[678] Towns v. Nims, 5 N. H. 259, 20 Am. Dec. 578; Sintzenick v. Lucas, 1 Esp. N. P. 43; Blackham's Case, 1 Salk. 290; Newell v. Carpenter, 118 Mass. 411.

[679] 15 N. H. 9, 41 Am. Dec. 675.

[680] See, also, Sanderson v. Peabody, 58 N. H. 116; Vaughan v. Morrison, 55 N. H. 580; Western M. & Manuf'g Co. v. Virginia Cannel Coal Co., 10 W. Va. 250; Lentz v. Wallace, 17 Pa. 412, 55 Am. Dec. 569; Garwood v. Garwood, 29 Cal. 521; Perkins v. Oliver, 110 Mich. 402, 68 N. W. 245; O'Brien v. Manwaring, 79 Minn. 86, 81 N. W. 746, 79 Am. St. Rep. 426; Keesey v. Old, 3 Tex. Civ. App. 1, 21 S. W. 693; Marks v. Sullivan, 8 Utah, 406, 32 Pac. 668, 20 L. R. A. 590. In King v. Chase, supra, Parker, C. J., stated and explained the doctrine in the following terms: "Any fact attempted to be established by evidence, and controverted by the adverse party, may be said to be in issue in one sense. As, for instance, in an action of trespass, if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff's evidence would show him to have been at a certain time, it may be said that this controverted fact is a matter in issue between the parties. This may be tried, and may be the only matter put in controversy by the evidence of the parties. But this is not the matter in issue within the meaning of the rule. It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, which is in issue. The declaration and pleadings may show specifically what this is, or they may not. If they do not, the party may adduce

This rule would of course exclude a case such as that above supposed. But we cannot concede its justice or policy, or even its technical correctness. The doctrine of res judicata does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried,—that the parties have had an adequate opportunity to say and prove all that they can in relation to it, that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated. Now these conditions are fully met when any question, though foreign to the original issue, becomes the decisive question, the turning-point in the case. In that event it will receive just as full and exhaustive an examination as if it were the sole subject-matter of a distinct and independent suit, and therefore should be considered as much settled by the judgment, as if it stood alone as the issue in the case.[681] For these reasons, the more correct doctrine is that the estoppel covers the point which was actually litigated, and which actually determined the verdict or finding, whether it was statedly and technically in issue or not. Numerous cases incline to this view,[682] and many attempts

other evidence to show what was in issue, and thereby make the pleadings as if they were special. But facts offered in evidence to establish the matters in issue are not themselves in issue, within the meaning of the rule, although they may be controverted on the trial. Deeds which are merely offered in evidence are not in issue even if their authenticity be denied. When a deed is merely offered as evidence to show a title, whether in a real or personal action, there is no non est factum involved in the matters put in issue by the plea of nul disseisin, or not guilty, which makes the execution of that deed a matter in issue in the case, notwithstanding the jury may be required to pass upon the fact of its execution. The verdict and judgment do not establish that fact the one way or the other, so that the finding is evidence. The title is in issue. The deed comes in controversy directly in one sense; that is, in the course taken by the evidence it is direct and essential. But in another sense it is incidental and collateral. It is not a matter necessary of itself to the finding of the issue. It may be made so by the parties." King v. Chase, 15 N. H. 9, 41 Am. Dec. 675.

[681] This is the line of reasoning adopted, in this connection, by Mr. Bigelow in his excellent treatise on Estoppel (3d Ed.) p. 112.

[682] Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Bissell v. Kellogg, 60 Barb. (N. Y.) 617; Florida Cent. R. Co. v. Schutte, 103 U. S. 143, 26 L. Ed. 327; Chamberlain v. Gaillard, 26 Ala. 504; Sherman v. Dilley, 3 Nev. 21; Lee v. Kingsbury, 13 Tex. 68, 62 Am. Dec. 546; Trayhern v. Colburn,

have been made to formulate a satisfactory statement of the true rule. Thus it has been said that the matter in issue or point in controversy is that ultimate fact or state of facts in dispute upon which the verdict or finding is predicated.[683] Again it is held that if a particular matter which was not necessarily involved in the issue, but which the issue was broad enough to cover, actually arose and was determined, it may be connected with the record by evidence aliunde.[684] In a well considered case in Nevada the court thought it was not necessary that the particular point "should have been directly and specifically put in issue by the pleadings, but it is sufficient if it is shown that the question which was tried in the former action between the same parties is again to be tried and settled in the suit in which the former judgment is offered in evidence. But when the fact is not directly put in issue by the pleadings, and it was not a fact necessary to be passed upon before judgment could be rendered, then parol evidence is admissible to show that the same fact was submitted to and passed upon by the jury in the former action. If this be not done, the judgment would, as evidence, be conclusive of nothing but the material facts directly put in issue by the pleadings, or such as it was necessary to pass upon in finding the verdict or rendering the judgment."[685] "It is not necessary to the conclusiveness of the former judgment that issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment."[686] Further, there are expressions to be found in the books to the effect that a judgment is conclusive not only upon the questions actually contested and determined, but upon all matters which, under the

66 Md. 277, 7 Atl. 459; Quinn v. Jenks, 88 Hun, 428, 34 N. Y. Supp. 962; Reiner v. Jones, 38 App. Div. 441, 56 N. Y. Supp. 423; Breckenridge v. Delaware, L. & W. R. Co., 58 N. J. Eq. 581, 43 Atl. 1097; Redden v. Metzger, 46 Kan. 285, 26 Pac. 689, 26 Am. St. Rep. 97; Shepard v. Stockham, 45 Kan. 244, 25 Pac. 559; Upton v. Betts, 59 Neb. 724, 82 N. W. 19; Territory v. Hopkins, 9 Okl. 133, 59 Pac. 976.

[683] Smith v. Town of Ontario (C. C.) 4 Fed. 386.

[684] Chamberlain v. Gaillard, 26 Ala. 504.

[685] Sherman v. Dilley, 3 Nev. 21, 24.

[686] Lee v. Kingsbury, 13 Tex. 68, 62 Am. Dec. 546; Oldham v. McIver, 49 Tex. 556, 572; Pray v. Hegeman, 98 N. Y. 351; Trayhern v. Colburn, 66 Md. 277, 7 Atl. 459.

issues, might have been litigated and decided in that suit.[687] But this statement is true only in the case where the prior judgment is offered as a bar to a second suit upon the same cause of action, not where the subject-matter of the two controversies is different. "Where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." [688]

§ 615. Points Necessary to Warrant the Judgment.

A judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered.[689] In other words, it is conclusive evidence of whatever it was necessary for the jury to have found in order to warrant the verdict in the former action, and no further.[690] For example, an

[687] Phelan v. Gardner, 43 Cal. 306; Rogers v. Higgins, 57 Ill. 244; Chesapeake & Ohio Canal Co. v. Gittings, 36 Md. 276; Shepardson v. Cary, 29 Wis. 34; Petersine v. Thomas, 28 Ohio St. 596; Beale's Adm'r v. Gordon (Va.) 21 S. E. 667; Boyd v. Robinson, 93 Tenn. 1, 23 S. W. 72; Roberts v. Moody, 107 Wis. 245, 83 N. W. 307.

[688] Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195.

[689] Leonard v. Whitney, 109 Mass. 265.

[690] Town v. Lamphere, 34 Vt. 365; Hunter v. Davis, 19 Ga. 413; Church v. Chapin, 35 Vt. 223. See, also, St. Joseph Union Depot Co. v. Chicago, R. I. & P. Ry. Co., 32 C. C. A. 284, 89 Fed. 648; Louisville Trust Co. v. City of Cincinnati (C. C.) 73 Fed. 716; Burlen v. Shannon, 14 Gray (Mass.) 433; Withington v. Warren, 12 Metc. (Mass.) 114; Palmer v. Hussey, 87 N. Y. 303; Burns v. Monell, 7 N. Y. Supp. 624; Merritt v. Peirano, 10 App. Div. 563, 42 N. Y. Supp. 97; Blake v. Ohio River R. Co., 47 W. Va. 520, 35 S. E. 953; Wilkinson v. Brinn, 124 N. C. 723, 32 S. E. 966; Bradford v. Knowles, 78 Tex. 109, 14 S. W. 307; Carlisle v. Howes (Ky.) 43 S. W. 191; John V. Farwell Co. v. Lykins, 59 Kan. 96, 52 Pac. 99; Ferris v. Udell, 139 Ind. 579, 38 N. E. 180; McIntyre v. Storey, 80 Ill. 127; Bowe v. Minnesota Milk Co., 44

action of forcible entry and detainer by a landlord against a tenant for the restitution of the whole or part of a farm does not necessarily involve the ownership of the crops grown by the tenant upon the farm during his occupancy; and a judgment in such action is no bar to an action by the tenant against the landlord for the conversion of such crops, or to any after action brought by either party.[691] In some states, however, a more liberal rule prevails, and it is held that if a question of title was decided in a former suit, although it was not strictly necessary for the court to have passed upon the question, yet if the point was distinctly raised by the pleadings, fully argued by counsel, and distinctly passed upon by the court, it is res judicata.[692] In further illustration of the rule, it is held that where a verdict and judgment, in an action involving two issues of fact, are consistent with a finding either way as to one of such issues, the same is not to be regarded as conclusively settled between the parties.[693]

§ 616. Points in Issue but not Decided.

Numerous cases (particularly among the earlier decisions) have held that the judgment of a court of competent jurisdiction is conclusive as to all questions within the issues raised in the case, whether or not they were formally contested or argued before the court or jury, or specifically included in the decision,[694] and that the force of the adjudication cannot be explained away, as to any such question, by testimony of jurors who tried the cause, that that question was not

Minn. 460, 47 N. W. 151; Morrill v. Little Falls Manuf'g Co., 46 Minn. 260, 48 N. W. 1124; Grunert v. Spalding (Wis.) 78 N. W. 606; Reed v. Cross, 116 Cal. 473, 48 Pac. 491.

[691] Waite v. Teeters, 36 Kan. 604, 14 Pac. 146.

[692] Almy v. Daniels, 15 R. I. 312, 4 Atl. 753. And see Empire State Nail Co. v. American Solid Leather Button Co., 21 C. C. A. 152, 74 Fed. 864; Franklin County v. German Sav. Bank, 142 U. S. 93, 12 Sup. Ct. 147, 35 L. Ed. 948.

[693] Bergeron v. Richardott, 55 Wis. 129, 12 N. W. 384. And see, infra, § 728.

[694] Barrett v. Failing, 8 Or. 152; Schmidt v. Zahensdorf, 30 Iowa, 498; Sicard v. Buffalo, N. Y. & P. R. Co., 15 Blatchf. 525, Fed. Cas. No. 12,831; Blodgett v. Dow, 81 Me. 197, 16 Atl. 660; Keokuk County v. Alexander, 21 Iowa, 377; McGregor v. McGregor, Id. 441; Donnell v. Wright, 147 Mo. 639, 49 S. W. 874; Flippen v. Dixon, 83 Tex. 421, 18 S. W. 803, 29 Am. St. Rep. 653; Flewellen v. Ft. Bend County, 17 Tex. Civ. App. 155, 42 S. W. 775.

considered by the jury.[695] But of late, the courts manifest a disposition to hold that no question or contention is finally settled by a judgment, although it may have been fairly within the issues, as raised by the pleadings, if it was not actually litigated, that is, supported or attacked by evidence, made the subject of the trial, submitted to the jury, or pressed upon the consideration of the court.[696] Thus, where a former judgment was pleaded as an estoppel against proving certain facts in a case, and it appeared that in the former suit the facts had been set up, but it did not appear that any proof had been offered in support of such facts, nor on what ground the defense rested or the verdict proceeded, it was considered that the former judgment was no bar to a second inquiry into the same facts.[697] This conclusion follows also, on even stronger reasons, when the record shows that the particular point or question was excluded from the consideration of the jury.[698] But of course this doctrine is subject to the limitation, explained in an earlier section,[699] that the judgment is conclusive of all questions necessarily inferable from it, or which were essential to the adjudication, in such sense that they must have been assumed or determined in a particular way before any such judgment could have been rendered, whether they were formally litigated or not. And it must also be observed that a judgment by default, where there is no actual trial of the issues, is nevertheless conclusive of all matters which were well and properly pleaded and necessary or material to the plaintiff's case.[700]

§ 617. Points not in Issue.

If a particular point was not in issue in the suit,—either in the technical sense of an issue framed by the pleadings, or in the sense

[695] Underwood v. French, 6 Or. 66, 25 Am. Rep. 500.

[696] Central Trust Co. v. Clark, 26 C. C. A. 397, 81 Fed. 269; Fayerweather v. Ritch (C. C.) 88 Fed. 713; Stannard v. Hubbell, 123 N. Y. 520, 25 N. E. 1084; Barber v. Kendall, 1 App. Div. 247, 37 N. Y. Supp. 141; Brury v. Smith, 8 Kan. App. 52, 53 Pac. 74; Kern v. Wilson, 82 Iowa, 407, 48 N. W. 919; Sweet v. Tuttle, 14 N. Y. 465; Teal v. Terrell, 48 Tex. 491.

[697] Colwell v. Bleakley, 1 Abb. Dec. 400.

[698] Thomas v. Hite, 5 B. Mon. (Ky.) 590.

[699] Supra, § 613.

[700] See, infra, § 697.

of being the decisive question in the case and the one actually litigated and determining the result,—it is not conclusively established by the judgment therein, for the purposes of a subsequent suit upon a different cause of action, although it may be expressly or tacitly involved in the judgment.[701] For example, in an action to procure the cancellation of a mortgage as having been paid, the pleadings put in issue the fact but not the amount due. It was determined that the mortgage was not paid, but the sum of $2754 was due thereon, and the complaint was dismissed. This adjudication is conclusive upon the parties only of the fact that something was due, but not of the amount.[702] So where mortgagors sue for the cancellation of a mortgage on their homestead, alleging lack of proper execution, the judgment will not estop them from urging, as a defense to a suit subsequently brought for foreclosure of the mortgage, such questions as partial want of consideration, partial payments, and the right to require that other securities shall first be exhausted.[703] So a judgment by default upon one of several notes founded upon one and the same illegal consideration, no issue upon the fact of consideration being tendered by the complaint, does not estop the defendant from setting up, in a second action, upon another of such notes, the defense of illegality of consideration.[704] Again, a bailee having con-

[701] Dennison v. United States, 168 U. S. 241, 18 Sup. Ct. 57, 42 L. Ed. 453; Missouri Pac. Ry. Co. v. Texas & P. Ry. Co. (C. C.) 50 Fed. 151; Burton v. Barlow's Estate, 55 Vt. 434; Comm. v. Sutherland, 109 Mass. 342; Matthews v. Duryee, 45 Barb. (N. Y.) 69; Sweet v. Tuttle, 14 N. Y. 465; Malloney v. Horan, 49 N. Y. 111, 10 Am. Rep. 335; Skinner v. Walter A. Wood M. & R. Mach. Co., 65 Hun, 622, 20 N. Y. Supp. 251; Howe v. First Nat. Bank (Pa.) 1 Atl. 787; Eaves v. Vial, 98 Va. 134, 34 S. E. 978; Stoddard v. McIlwain, 9 Rich. Law (S. C.) 451; Davidson v. Shipman, 6 Ala. 27; Rake's Adm'r v. Pope, 7 Ala. 161; Hart v. Picard, 75 Miss. 651, 23 South. 450; Robinson v. Dickey, 14 Tex. Civ. App. 70, 36 S. W. 499; Gray v. Edwards, 3 Tex. Civ. App. 361, 22 S. W. 537; Coulter v. Davis, 13 Lea (Tenn.) 451; Johnston v. Osmont (Tenn.) 59 S. W. 644; Bentley v. O'Bryan, 111 Ill. 53; Foote v. Clark, 102 Mo. 394, 14 S. W. 981, 11 L. R. A. 861; Boutin v. Lindsley, 84 Wis. 644, 54 N. W. 1017; Sobolisk v. Jacobson, 6 N. D. 175, 69 N. W. 46; Nickum v. Danvers, 28 Or. 322, 42 Pac. 130; Applegate v. Dowell, 15 Or. 513, 16 Pac. 651; Meredith v. Santa Clara Min. Ass'n, 56 Cal. 178; Dietz v. Mission Transfer Co., 95 Cal. 92, 30 Pac. 380.

[702] Campbell v. Consalus, 25 N. Y. 613.

[703] Des Moines Nat. Bank v. Harding, 86 Iowa, 153, 53 N. W. 99.

[704] Adams v. Adams, 25 Minn. 72.

verted goods on which he had bestowed labor and acquired a lien, the owner brought trover and recovered a judgment for the conversion; afterwards the bailee sued for his work and labor; and it was held that the former judgment raised no presumption that the lienor's claim was adjudicated and allowed in estimating damages.[705] So, a judgment for the possession of shares of stock held by a trustee is no bar to an action for damages for the depreciation in value of the stock, while it was unlawfully detained, where no issue as to damages was involved in the previous litigation.[706] So again, a judgment in a suit for interest (as on a bond), particularly when evidenced by a distinct obligation (as a coupon), is not res judicata as to the principal contract, unless, in such suit, the validity of the original contract itself was adjudicated upon.[707] For similar reasons, a judgment establishing the contention that a bank is not liable to taxation on its capital and its banking house and furniture does not settle the question of its immunity from the payment of a license tax.[708] And the recovery of judgment for taxes provided for by an unconstitutional act, in an action in which the validity of the statute is not questioned, does not estop the successful party from alleging, in a subsequent suit between the same parties upon a different cause of action, that the act is unconstitutional.[709] Where, in a patent infringement suit, the defendant did not deny the validity of the patent, but claimed a license under it to sell the patented articles, and the existence of such license was the only issue litigated, it was held that a decision in favor of complainant did not estop defendant

[705] Longstreet v. Phile, 39 N. J. Law, 63.

[706] Bracken v. Atlantic Trust Co., 23 Misc. Rep. 579, 51 N. Y. Supp. 1007. Where bonds were deposited with plaintiff as security for loans and other liabilities, and it was agreed that defendant should deposit more bonds as additional security, and that plaintiff should perform a certain contract; and plaintiff brought an action for specific performance of the contract to deliver the additional bonds, and judgment went against him on the ground that he had failed to perform said contract; it was held that the judgment was not conclusive as to his right to hold the bonds deposited as security for the loans. Stokes v. Stokes, 155 N. Y. 581, 50 N. E. 342.

[707] Louisiana State Bank v. Orleans Nav. Co., 3 La. Ann. 294, 312.

[708] City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202.

[709] City of Philadelphia v. Ridge Ave. Pass. Ry. Co., 142 Pa. 484, 21 Atl. 982, 28 Wkly. Notes Cas. 106.

from questioning the validity of the patent in a subsequent suit.[710] So, a judgment rendered in a case wherein the question was as to prior rights of purchasers of a tract of land, no issue being formed as to boundaries, does not operate as an estoppel in a suit where the line is in issue.[711] For the same reason, the right to sue for damages caused by the operation of a railroad is not cut off by a decree in a former suit establishing the right to build the road.[712] A judgment dismissing a complaint, which alleged the obstruction of a road over which the plaintiff had a right of way in gross, is not an adjudication that will defeat a second action alleging the obstruction of the same road to the detriment of the plaintiff's right of way appendant or appurtenant.[713] For another illustration, where a plaintiff, declaring on an account stated, offers certain promissory notes as evidence to prove the fact of an accounting, but the evidence is rejected and judgment given against the plaintiff, this will not bar a future action by him on the notes.[714] Of course, a judgment being conclusive only upon matters within the issues, it is not an estoppel as to after-occurring facts not involved in the suit in which the judgment was rendered.[715] So the conclusive effect of a judgment does not extend to references made by a party in his pleadings to matter not involved in the controversy, such references being made merely for the purpose of elucidating the points really at issue.[716] And although a de-

[710] Lublin v. Stewart, Howe & May Co. (C. C.) 75 Fed. 294. Where a decree sustains one claim of a patent, but there is nothing in either the decree or the opinion showing whether another claim is or is not valid, the defendant in a second suit is not estopped from contesting its validity. Thompson v. N. T. Bushnell Co. (C. C.) 80 Fed. 332.

[711] Linney v. Wood, 66 Tex. 22, 17 S. W. 244; Kashman v. Parsons, 70 Conn. 295, 39 Atl. 179; Peterson v. Sohl, 141 Ind. 466, 40 N. E. 910.

[712] Louisville & N. R. Co. v. Orr (Ky.) 15 S. W. 8.

[713] Whaley v. Stevens, 24 S. C. 479.

[714] Lindell v. Liggett, 1 Mo. 432, 14 Am. Dec. 298.

[715] Mitchell v. French, 100 Ind. 334. And see Gore v. Gore, 101 Tenn. 620, 49 S. W. 737; Franke v. Franke, 15 Ind. App. 529, 43 N. E. 468; supra, § 609.

[716] Hobbs v. Parker, 31 Me. 143. A refusal by the court to dissolve an attachment obtained by a creditor on the ground that the debtor had fraudulently omitted to include a judgment by confession in a statement of liabilities, on the faith of which the goods were furnished, is not equivalent to an adjudication that the judgment was fraudulently obtained, and does not estop the judgment creditor from enforcing it against the debtor's property. Reese v. Reese, 157 Pa. 200, 27 Atl. 703.

cree in express terms professes to affirm a particular fact, yet if such fact was immaterial to the issue and the controversy did not turn upon it, the decree will not conclude the parties in reference to such fact.[717] But still, if the former suit, upon the trial of it, had a wider range than the pleadings in it indicated, such fact might, under appropriate issues, be shown by parol proof.[718]

§ 618. Matters which could not have been Adjudicated.

A judgment is not conclusive of any matter which, from the nature of the case, the form of action, or the character of the pleadings, could not have been adjudicated in the former suit.[719] "There can be no bar if the demand to which, by their evidence, the parties directed the attention of the court, and which the court rejected, was not within the issue and consequently could not have been allowed. The estoppel does not depend upon technicalities, but rests in broad principles of justice, and it can apply only when the party has had his day in court and an opportunity to establish his claim. The fact that a suit has been instituted and evidence produced is of no importance whatever, if in fact the evidence was directed to matters which were foreign to the issue. If, for example, the plaintiff in an action of assumpsit were to attempt to litigate a matter of trespass to lands, it would be immaterial how far he should go into the evidence, or at what stage of the proceedings the ruling should be made rejecting his claim; the bar cannot attach, because in law, whatever may have been the testimony, there could have been no recovery. Nothing would seem to be plainer than that no man could be barred by a judgment against him who was not by the issue placed in such

[717] People v. Johnson, 38 N. Y. 63, 97 Am. Dec. 770.

[718] Indianapolis & C. R. Co. v. Clark, 21 Ind. 150.

[719] City and County of San Francisco v. Le Roy, 138 U. S. 656, 11 Sup. Ct. 364, 34 L. Ed. 1096; Harding v. Hale, 2 Gray (Mass.) 399; Cobb v. Fogg, 166 Mass. 466, 44 N. E. 534; Baker v. Rand, 13 Barb. (N. Y.) 152; Mershon v. Williams, 63 N. J. Law, 398, 44 Atl. 211; Jenkins v. Harrison, 66 Ala. 345; McLane v. Miller, 12 Ala. 643; Bates v. Crowell, 122 Ala. 611, 25 South. 217; Teal v. Terrell, 48 Tex. 491; Scully v. Lowenstein, 56 Miss. 652; Stringer v. Adams, 98 Ind. 539; Water Supply & Storage Co. v. Larimer & Weld Reservoir Co., 25 Colo. 87, 53 Pac. 386; People v. Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; Ramsbottom v. Bailey, 124 Cal. 259, 56 Pac. 1036.

a position that establishing his demand would entitle him to a judgment in his favor."[720] Thus, in an action of debt for money lent and other causes, the defendant pleaded in bar a former recovery by the plaintiff of the same claim, had in a suit on a promissory note and for work and labor. But it was held that the plea was bad, inasmuch as the plaintiff, in the former suit, could not have given evidence of money lent, and consequently the present demand could not have been proved.[721]

But the rule applies not only where questions affecting the relative rights of the parties could not be litigated on account of the form of the action, or the scope of the issues as determined by the pleadings, but also in cases where such questions were excluded from consideration because the particular court had no jurisdiction to pass upon them. Thus, where the powers of probate courts are limited to particular inquiries, or particular kinds of proceedings, instances of the application of the rule may be found,[722] and matters which are cognizable only in equity are not concluded by the judgment in an action at law, where they could not be set up or tried.[723]

§ 619. Judgment on Matters not Presented.

We have elsewhere shown that if the court assumes to pass judgment upon a point or question not submitted to its arbitrament by the parties in their pleadings, nor drawn into controversy by the course of the evidence, the judgment, to that extent, is without jurisdiction and consequently null.[724] It follows that the judgment of a court upon a subject of litigation within its general jurisdiction, but not brought before it by any statement or claim of the parties, is not conclusive of that matter in any subsequent controversy, by reason of its invalidity.[725] Thus, in an action to restrain defendant's use

[720] Fifield v. Edwards, 39 Mich. 264.

[721] Athearn v. Brannan, 8 Blackf. (Ind.) 440.

[722] Sanders v. Soutter, 126 N. Y. 193, 27 N. E. 263; Puterbaugh v. Puterbaugh, 7 Ind. App. 280, 33 N. E. 808; Doddridge's Estate v. Doddridge, 24 Ind. App. 60, 56 N. E. 112.

[723] White v. Crew, 16 Ga. 416.

[724] Supra, vol. 1, § 242.

[725] Spoors v. Cowen, 44 Ohio St. 497, 9 N. E. 132; Semple v. British Columbia Bank, 5 Sawy. 394, Fed. Cas. No. 12,660; Mitchell v. Insley, 33 Kan.

of a name which plaintiff claims as his trade-mark, where the judgment is that defendant be restrained as prayed, and that he account to plaintiff for all the contracts procured by him under the name in question, a finding of fact that defendant had been employed to sell plaintiff's goods at a certain commission is irrelevant, and is not res judicata upon the rate of commissions in a subsequent action by defendant for such commissions.[726] So where, in an action of ejectment, the consideration of the character of the title is foreign to the case and unnecessary for its disposition, any declaration in the decree as to that title is without binding force as an adjudication, either upon parties, privies, or strangers.[727] And a judgment obtained in an action to have a deed declared to be merely a mortgage, which further declares that the grantor is tenant of the grantee, is not evidence on the latter question, the same not having been in issue in the suit, and the fact being wholly immaterial to the judgment.[728]

§ 620. Claims Withdrawn or Withheld.

According to the general doctrine of the cases, where a former judgment is set up as a bar, or as conclusive evidence of a particular fact or matter, the plaintiff may avoid the estoppel by showing that such matter, though involved in the prior litigation, was distinctly withdrawn or abandoned, or stricken out on motion, or ruled out by the court as irrelevant, and so withheld from the consideration of the jury, and therefore constituted no part of the verdict or judgment.[729] Thus, if a plaintiff sues for several distinct causes of action,

654, 7 Pac. 201; People v. Johnson, 37 Barb. (N. Y.) 502; Hume v. Commercial Bank, 1 Lea (Tenn.) 220; McIntire v. Linehan, 178 Mass. 263, 59 N. E. 767; In re Metropolitan Ry. Co., 58 Hun, 563, 12 N. Y. Supp. 859; Fox v. McComb, 63 Hun, 630, 17 N. Y. Supp. 783; Gillim v. Daviess County (Ky.) 14 S. W. 838; East Tennessee, V. & G. Ry. Co. v. Mahoney, 89 Tenn. 311, 15 S. W. 652; McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421.

[726] Springer v. Bien, 128 N. Y. 99, 27 N. E. 1076.

[727] Fulton v. Hanlow, 20 Cal. 450.

[728] People v. Johnson, 14 Abb. Prac. (N. Y.) 416.

[729] Seddon v. Tutop, 6 Term R. 607; McComb v. Frink, 149 U. S. 629, 13 Sup. Ct. 993, 37 L. Ed. 876; Croft v. Steele, 6 Watts (Pa.) 373; Kaster v. Welsh, 157 Pa. 590, 27 Atl. 668; Salinas v. C. Aultman & Co., 45 S. C. 283, 22 S. E. 889; Brothers v. Beck, 75 Miss. 482, 22 South. 944; Haas v. Taylor, 80 Ala. 459, 2 South. 633; Patrick v. Commissioners' Court (Tex.) 6 S. W. 626;

and, by leave of court, withdraws one of them, and proceeds to judgment for the others, it is no bar to a subsequent action for the claim so withdrawn.[730] So where it appears on the very face of the judgment that the plaintiff's demand was not passed upon by the court, but that the plaintiff applied for a discontinuance, and on its being refused, he declined giving any evidence, and the court merely considered the counterclaim of the defendant, and gave a judgment in his favor for the amount, the plaintiff may bring another suit for the demand which he declined to submit for adjudication in the former action.[731] But this rule must not be taken for more than it is worth. It applies only to cases in which the claim reserved is a distinct and independent matter and legally capable of being detached from the rest of the plaintiff's case. It is therefore a complementary part of the rule that the plaintiff must ask for all he is entitled to in the first action, and anything is barred which might and should have been presented as an inseparable part of his demand.[732] The rule, as thus understood, applies equally to matters of defense first set up and then withdrawn.[733] For instance, a judgment for the plaintiff in an action

Wood v. Cahill, 21 Tex. Civ. App. 38, 50 S. W. 1071; Smith v. Talbot, 11 Ark. 666; Parker v. Shannon, 137 Ill. 376, 27 N. E. 525; Busch v. Jones, 94 Mich. 223, 53 N. W. 1051; Johnson v. Johnson, 20 Colo. 143, 36 Pac. 898; McNicholas v. Lake, 13 Colo. App. 164, 56 Pac. 987; Bingham v. Honeyman, 32 Or. 129, 52 Pac. 755; Johnson v. Vance, 86 Cal. 110, 24 Pac. 862. Compare Barrett v. Failing, 8 Or. 152; Glenn v. Savage, 14 Or. 567, 13 Pac. 442; Stern v. Washington Nat. Bank, 14 Wash. 511, 45 Pac. 37.

[730] Killion v. Wright, 34 Pa. 91; Steelman v. Sites' Ex'rs, 35 Pa. 216; Wood v. Corl, 4 Metc. (Mass.) 203; Boston Blower Co. v. Brown, 149 Mass. 421, 21 N. E. 883; Louw v. Davis, 13 Johns. (N. Y.) 227.

[731] Jones v. Underwood, 35 Barb. (N. Y.) 211. See Crebbin v. Bryce, 24 Tex. Civ. App. 532, 60 S. W. 587; Rackley v. Fowlkes (Tex. Civ. App.) 36 S. W. 75. But a party may not present issues for determination, and avoid the effect of an estoppel by withholding proof thereof. Slater v. Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444.

[732] Thompson v. Myrick, 24 Minn. 4.

[733] Where a right to redeem from a tax sale was pleaded as an equitable defense to an action of ejectment brought by the purchaser, but the defense was withdrawn at the trial, it was held that a judgment for the plaintiff would be no bar to a suit to redeem. Cockerill v. Stafford, 102 Mo. 57, 14 S. W. 813. So where, in an action for the recovery of land, two defenses are set up,—the second being only as to a part of the land,—and the judge limits the verdict to the second defense, and the jury returns a general verdict for

for use and occupation of land, in which the defendant alleged that he was in possession under a contract to purchase the land, but afterwards struck out the allegations in regard to the contract, does not bar the defendant from claiming, in a subsequent action in ejectment for the same land, for improvements made while in possession under said contract, as improvements made while in possession under color of title.[734] But to admit a suit for a matter once offered to be proved as a set-off and rejected, there must be clear proof that it was withdrawn by the party.[735]

§ 621. Entire Demands cannot be Severed.

Growing out of the rule which forbids the splitting up of an indivisible claim or demand,[736] there is a corollary or subsidiary rule which has a most important bearing upon the doctrine now under consideration. It may be expressed as follows: When the cause of action upon which a judgment is rendered is entire, and therefore insusceptible of severance or apportionment, the estoppel will extend to the whole, and it cannot be shown, even on the clearest evidence, that any part was withheld from the decision.[737] Thus where a recovery has been had in a suit in which the plaintiff counted for an entire demand, the record of such recovery is a conclusive bar to another suit brought on the same contract, to recover a sum which was included in the declaration in the first suit, and the plaintiff will not be permitted to prove that no evidence was given to the former jury in support of the latter claim.[738] But where the cause of action is severable in its nature, or where several distinct causes of action

the defendant, the judgment is res judicata only as to the land included in the second defense. Duren v. Kee, 41 S. C. 171, 19 S. E. 492.

[734] Finnegan v. Campbell, 74 Iowa, 158, 37 N. W. 127. And see Shaw v. Broadbent, 129 N. Y. 114, 29 N. E. 238.

[735] Muirhead v. Kirkpatrick, 2 Pa. 425.

[736] Infra, § 734.

[737] Brockway v. Kinney, 2 Johns. (N. Y.) 210; Farrington v. Payne, 15 Johns. (N. Y.) 432; Hess v. Heeble, 4 Serg. & R. (Pa.) 246; Carvill v. Garrigues, 5 Pa. 152; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Duffy v. Lytle, 5 Watts (Pa.) 120; Miller v. Manice, 6 Hill (N. Y.) 114; Ramsey v. Herndon, 1 McLean, 450, Fed. Cas. No. 11,546; O'Neal v. Brown, 21 Ala. 482; Warren v. Comings, 6 Cush. (Mass.) 103; Converse v. Colton, 49 Pa. 346.

[738] Hess v. Heeble, 6 Serg. & R. (Pa.) 57.

were set forth in the same declaration, although it will still be presumed that the judgment includes the whole, yet this presumption may be rebutted by clear evidence that it extends only to part.[739]

§ 622. Facts Assumed or Admitted.

In pursuance of the general principle that a former judgment or decree between the same parties is conclusive evidence only of the facts which were in issue and decided, it is held that such an adjudication is not proof of facts which were assumed or admitted for the purposes of the former suit, but which were only incidentally or collaterally in question there, or were not necessary to its determination.[740] But in respect to facts which were essential to the judgment, —facts without which the judgment could not legally have been given as it was given,—the adjudication is as conclusive in subsequent litigation between the same parties, when such facts were confessed or admitted in the pleadings, as it would be if they had been contested and found by the verdict.[741] Thus, an admission by defendant of an allegation in the complaint that a deed made by plaintiff to defendant was in fact a mortgage is equivalent to a finding on that point, and is decisive in a subsequent action between the parties.[742] On the same principle, a proposition assumed or decided by the court to be true, and which must be so assumed to establish another proposition, which expresses the conclusion of the court, is as effectually passed on as the matter directly decided.[743]

[739] Brown v. King, 10 Mo. 56; Goddard v. Selden, 7 Conn. 521; Smith v. Talbot, 6 Eng. 666; Webster v. Lee, 5 Mass. 334; Badger v. Titcomb, 15 Pick. (Mass.) 409, 26 Am. Dec. 611; Croft v. Steele, 6 Watts, 373; Converse v. Colton, 49 Pa. 346; Paine v. Schenectady Ins. Co., 12 R. I. 440.

[740] Mason's Ex'rs v. Alston, 9 N. Y. 28, 59 Am. Dec. 515; Dickinson v. Price, 64 Hun, 149, 18 N. Y. Supp. 801; Boileau v. Rutlin, 2 Exch. 665.

[741] Harper v. Harper, 3 C. C. A. 415, 53 Fed. 35; Miller v. Union Switch & Signal Co., 59 Hun, 624, 13 N. Y. Supp. 711; Davenport v. Buffington (Ind. T.) 45 S. W. 128.

[742] Fowler v. Osborne, 111 N. C. 404, 16 S. E. 470.

[743] Trustees of School District No. 28 v. Stocker, 42 N. J. Law, 115.

§ 623. Evidence to Identify Points Adjudged.

It has been held in a few cases (principally very early decisions) that the record of a judgment in a former suit between the same parties, to constitute an estoppel, must show that the same subject-matter had been passed upon and adjudicated in that suit. In other words, that an estoppel cannot be created by parol evidence helping out a record; but to constitute an estoppel by a former judgment, the precise point which is to create the estoppel must have been put in issue and decided, and that it was so put in issue and decided can appear by the record alone.[744] But this doctrine, so far as concerns the kind of evidence admissible to identify the points adjudicated, is now generally repudiated.

§ 624. Parol Proof Admissible.

It is now fully settled upon the authorities that extrinsic evidence, when not inconsistent with the record and not impugning its verity, is admissible for the purpose of identifying the points litigated and decided in a former action between the same parties, when the judgment therein is set up as a bar or estoppel in the case on trial.[745]

[744] Sintzenick v. Lucas, 1 Esp. N. P. 43; The Vincennes, 3 Ware, 171, Fed. Cas. No. 16,945; Church v. Leavenworth, 4 Day (Conn.) 281; Smith v. Sherwood, 4 Conn. 276, 10 Am. Dec. 143; Jackson v. Wood, 3 Wend. (N. Y.) 27; Davis v. Talcott, 14 Barb. (N. Y.) 611; Manny v. Harris, 2 Johns. (N. Y.) 29, 3 Am. Dec. 386; Clemens v. Murphy, 40 Mo. 121.

[745] Ricardo v. Garcias, 12 Clark & F. 368; Langmead v. Maple, 18 C. B. (N. S.) 255; Aspden v. Nixon, 4 How. 467, 11 L. Ed. 1059; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Wilson's Ex'r v. Deen, 121 U. S. 525, 7 Sup. Ct. 1004, 30 L. Ed. 980; Ricaud v. Tysen (C. C.) 78 Fed. 561; Fayerweather v. Ritch (C. C.) 88 Fed. 713; Newton Manuf'g Co. v. Wilgus (C. C.) 90 Fed. 483; Dunlap v. Glidden, 34 Me. 519; Rogers v. Libbey, 35 Me. 200; King v. Chase, 15 N. H. 9, 41 Am. Dec. 675; Aiken v. Peck, 22 Vt. 255; Post v. Smilie, 48 Vt. 185; Gage v. Holmes, 12 Gray (Mass.) 428; Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733; Hood v. Hood, 110 Mass. 483; Supples v. Cannon, 44 Conn. 424; Snider v. Croy, 2 Johns. (N. Y.) 227; Stowell v. Chamberlain, 3 Thomp. & C. 374; Carleton v. Lombard, Ayres & Co., 149 N. Y. 137, 43 N. E. 422; Tams v. Lewis, 42 Pa. 402; Follansbee v. Walker, 74 Pa. 306; Richmond v. Hays, 3 N. J. Law, 492; Hughes v. Jones, 2 Md. Ch. 178; Whitehurst v. Rogers, 38 Md. 503; Gist v. McJunkin, 1 Speers (S. C.) 157; Newton Manuf'g Co. v. White, 47 Ga. 490; Rake's Adm'r v. Pope, 7 Ala. 161; Robinson v. Lane, 22

That is, "it is not necessary as between parties and privies that the record should show the question upon which the right of the plaintiff to recover or the validity of the defense depended, for it to operate conclusively; but only that the same matter in controversy might have been litigated, and extrinsic evidence would be admitted to prove that the particular question was material and was in fact contested and that it was referred to the decision of the jury." [746] The ancient rule must therefore be regarded as modified by the later decisions, so as to assume the following form: The record must show that the same matter might have come in question on the former trial, and then the fact that it did come in question may be shown by extrinsic proof.[747] For example, where, in an action of ejectment, the defendant, to defeat the action, introduced and read in evidence the record of a judgment in a former action of ejectment between the same parties for the same premises, by which it appeared that a verdict was rendered for the defendant and a judgment entered thereon, it was held that the plaintiff might prove by a person present what title the defendant set up and established on the former trial, and on what questions the suit was litigated and decided, those facts not appearing by the record.[748]

Further, if the record is silent or ambiguous, as to the points at issue and the grounds of the decision, parol evidence is not only competent to identify the questions adjudged, but it may become necessary in order to insure the effect of the judgment as an estoppel. "If it appear that several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the

Miss. 161; Foster v. Wells, 4 Tex. 101; Reast v. Donald, 84 Tex. 648, 19 S. W. 795; Davis v. Schaffner, 3 Tex. Civ. App. 121, 22 S. W. 822; Gates v. Bennett, 33 Ark. 475; Bottorff v. Wise, 53 Ind. 32; Barger v. Hobbs, 67 Ill. 592; George v. Gillespie, 1 G. Greene (Iowa) 421; Amsden v. Dubuque & S. C. R. Co., 32 Iowa, 288; Sweet v. Maupin, 65 Mo. 65; Driscoll v. Damp, 16 Wis. 106; Mahaffey v. Rogers, 10 Ohio Cir. Ct. R. 24; Leopold v. City of Chicago, 150 Ill. 568, 37 N. E. 892; Irish-American Bank v. Ludlum, 56 Minn. 317, 57 N. W. 927; McLeod v. Lee, 17 Nev. 103, 28 Pac. 124; Graves v. Hebbron, 125 Cal 400, 58 Pac. 12.

[746] Washington A. & G. Steam Packet Co. v. Sickles, 24 How. 333, 16 L Ed. 650.

[747] Young v. Rummell, 2 Hill, 478, 38 Am. Dec. 594.

[748] Briggs v. Wells, 12 Barb. 567.

whole subject-matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined."[749] A good illustration of this rule is found in the case of McDowell v. Langdon,[750] where it was held that a verdict and judgment for the defendants, in an action at law for obstructing the flow of water to the plaintiff's mill, on a plea of not guilty and a specification of defense denying both the plaintiff's right and any injury thereof, were no bar to a suit in equity to restrain such obstruction, where, upon the record of the former action, it was doubtful (and was not shown by extrinsic evidence) whether the defendants in that case prevailed on the ground that they had the right which they claimed in their specification of defense, or on the ground that they had done no acts in violation of the plaintiff's rights.

§ 625. Record cannot be Contradicted.

It is very necessary to be borne in mind, in connection with the rules just stated, that the averments or disclosures of the record, in respect to the matters decided, cannot be controverted by any extraneous evidence. They may be explained, when ambiguous. They may be made specific, when generally expressed. But they cannot be contradicted.[751] When it is apparent on the face of the proceedings in the former action that the question in controversy was litigated therein, the mere production of the record will be enough.[752]

[749] Chrisman's Adm'x v. Harman, 29 Grat. (Va.) 494, 26 Am. Rep. 387; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Clark v. Blair (C. C.) 14 Fed. 812; Jones v. Beaman, 117 N. C. 259, 23 S. E. 248; Morgan v. Mitchell, 52 Neb. 667, 72 N. W. 1055; Slater v. Skirving, 51 Neb. 108, 70 N. W. 493, 66 Am. St. Rep. 444; Lillis v. People's Ditch Co. (Cal.) 29 Pac. 780; Lea v. Lea, 99 Mass. 493, 96 Am. Dec. 772; Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8.

[750] 3 Gray (Mass.) 513.

[751] Alabama Iron & R. Co. v. Austin, 36 C. C. A. 536, 94 Fed. 897; Fuller v. Metropolitan Life Ins. Co., 68 Conn. 55, 35 Atl. 766, 57 Am. St. Rep. 84; In re Broderick, 25 Misc. Rep. 534, 56 N. Y. Supp. 99; McGrady v. Monks, 1 Tex. Civ. App. 611, 20 S. W. 959; Pilcher v. Ligon, 91 Ky. 228, 15 S. W. 513; Winans v. Rosecrans, 8 Kan. App. 455, 54 Pac. 508; Eaton v. Harth, 45 Ill. App. 355.

[752] Lander v. Arno, 65 Me. 28; Empire State Nail Co. v. American Solid

"If the record of the former trial shows that the verdict could not have been rendered without deciding the particular matter, it will be considered as having settled that matter as to all future actions between the parties." [753] Where the declaration in the first suit states a particular matter as the ground of action, and issue is taken thereon by the defendant, parol proof is not admissible to show that a different subject was litigated upon the trial.[754]

§ 626. Parol Evidence not Admissible to Enlarge the Estoppel.

It is held that parol evidence is not admissible to show that a judgment was founded upon matters not presented by the pleadings. "The record is conclusive evidence," says the supreme court of Maine, "that the judgment was rendered upon some one or more of the issues legitimately raised by the pleadings of the parties. The parol proof is only to distinguish which of those several issues were decided, or to show that some particular fact was decided in the determination of some of those issues." [755] But by recurring to a former section, in which we discussed the meaning of the phrase "the matter in issue," it will be seen that the most approved doctrine makes the judgment conclusive of any matter which, though not technically and statedly at issue on the pleadings, became the actual turning-point of the case and the actually decisive question.[756] Hence we must state the present branch of the main rule somewhat as follows: Parol evidence is not admissible to enlarge the estoppel beyond the limits of those points or questions which, from the face of the pleadings, might have become the vital issue in the former trial.

Leather Button Co., 21 C. C. A. 152, 74 Fed. 864; Sargent & Co. v. New Haven Steamboat Co., 65 Conn. 116, 31 Atl. 543.

[753] Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 580, 18 L. Ed. 550.

[754] Campbell v. Butts, 3 N. Y. 173.

[755] Jones v. Perkins, 54 Me. 393. See, also, Manny v. Harris, 2 Johns. (N. Y.) 24, 3 Am. Dec. 386; Topliff v. Topliff, 8 Ohio Cir. Ct. R. 55.

[756] Supra, § 614.

§ 627. General Declaration or General Pleas.

The ancient rule of law, that in order to constitute a judgment an estoppel, it was necessary that it should appear from the record itself that the precise point was in issue and decided, could only refer, and could only be practically applied, to instances of special pleading, where there is a precise averment on one side and an equally precise denial on the other. But such cases are comparatively rare. Under the modern systems, admitting general declarations and general pleas, it can but seldom appear from the record what was the precise subject-matter of the suit or the precise point litigated. Here, then, according to all the best authorities, parol evidence is always admissible to show such subject-matter or point controverted; and when it is thus clearly shown, the judgment is equally as conclusive as if the record itself showed the same fact.[757] "The modern mode of declaring in most general use is to insert several general counts, and when in such case the general issue is pleaded, a vast variety of different claims may be put in issue and tried,—so various, indeed, that in most cases it is found necessary to call in the assistance of the court previously to the trial, to require the plaintiff to give in a bill of particulars or specifications of the claims which he means to give in evidence, in order to apprise the defendant of the actual claims relied on, which the declaration does not do, to enable him to go to trial with any safety. When such a judgment is pleaded in bar, it seems to be liberal enough, and going as far in support of a judgment as experience will warrant, to consider it as prima facie evidence of a prior adjudication of every demand which might have been drawn into controversy under it, leaving it, like other prima facie evidence, to be encountered and controlled by any other competent evidence tending to show that any particular demand was not offered

[757] Miles v. Caldwell, 2 Wall. 35, 17 L. Ed. 755; Perkins v. Walker, 19 Vt. 144; Atwood v. Robbins, 35 Vt. 530; Sawyer v. Woodbury, 7 Gray (Mass.) 499, 66 Am. Dec. 518; Merritt v. Morse, 108 Mass. 270; Supples v. Cannon, 44 Conn. 424; Belleville & St. L. Ry. Co. v. Leathe, 28 C. C. A. 279, 84 Fed. 103; Sawyer v. Nelson, 160 Ill. 629, 43 N. E. 728; Lewis v. Ocean Nav. & Pier Co., 125 N. Y. 341, 26 N. E. 301; Stedman v. Patchin, 34 Barb. (N. Y.) 218; Haller v. Pine, 8 Blackf. (Ind.) 175, 44 Am. Dec. 762.

or considered."[758] In point of fact, as was remarked in another case, independent of evidence as to the points in issue upon the trial, the record of a judgment upon a general declaration only shows that there was once a law-suit about the property, in which something was decided, and such evidence would be inadmissible for want of materiality.[759] But still, in an action where there are numerous issues and a general verdict, it must be intended that the verdict is as comprehensive as the issues, and concludes every fact at issue, though parol proof will be received to show which issue was tried.[760] For instance, in an action of trespass q. c. f., the defendant pleaded a former recovery; the record of the former suit showed that the pleas were (1) not guilty, and (2) a special plea of right of way over the land on which the trespass was assigned, and that there was a general verdict and judgment for defendant; it was held that parol evidence was admissible to show that the former trial was had on only one of the said pleas.[761]

§ 628. Parol Evidence to Escape the Estoppel.

Whenever a judgment in a former action is relied upon as conclusive of a particular point or question, it may be shown by extrinsic evidence, not inconsistent with the record, that such point or question was not adjudicated in that action, if in law the judgment could have been rendered on any other ground.[762] "It is a well settled rule of law that if a verdict, award, or judgment of a court of com-

[758] Bridge v. Gray, 14 Pick. (Mass.) 55, 25 Am. Dec. 358. See, also, Hungerford's Appeal, 41 Conn. 322; Ingwersen v. Buchholz, 88 Ill. App. 73.

[759] Taylor v. Dustin, 43 N. H. 493.

[760] Hall v. Zeller, 17 Or. 381, 21 Pac. 192. And see Slater v. Skirving, 51 Neb. 408, 70 N. W. 493, 66 Am. St. Rep. 444; Downing v. Missouri, K. & T. Ry. Co., 70 Mo. App. 657; Topliff v. Topliff, 8 Ohio Cir. Ct. R. 55.

[761] Aiken v. Stewart, 4 Wkly. Notes Cas. 180. See, also, Fendall v. United States, 14 Ct. Cl. 247.

[762] Johnson v. Smith, 15 East, 213; Whittemore v. Whittemore, 2 N. H. 26; Parks v. Moore, 13 Vt. 183, 37 Am. Dec. 589; Parker v. Thompson, 3 Pick. (Mass.) 429; Phillips v. Berick, 16 Johns. (N. Y.) 136, 8 Am. Dec. 299; Coleman's Appeal, 62 Pa. 252; Swayne v. Lyon, 67 Pa. 436; Southside R. Co. v. Daniel, 20 Grat. (Va.) 363; Allebaugh v. Coakley, 75 Va. 628; Dunlap v. Edwards, 29 Miss. 41; Bottorff v. Wise, 53 Ind. 32; State v. Morton, 18 Mo. 53; Sweet v. Maupin, 65 Mo. 65.

petent jurisdiction, has apparently, but not necessarily, covered the very ground on which a second action is brought, though this would be, perhaps, prima facie evidence that the matter had passed in rem judicatam, yet it may still be averred, and proved by parol testimony, that the cause of the second action was not in issue, and the point to be established by it was not in fact decided, in the former case." [763] So it is competent to prove that a former action was decided solely on one particular ground, although there was another ground of defense concerning which evidence was offered on both sides.[764] Where a plea of former recovery is put in, and the plaintiff is permitted to show that the matters now in controversy were not litigated in the former suit, the defendant must also be allowed to give evidence to show that the same matters were in fact passed upon and decided, and the refusal of the court to allow this privilege to the defendant, while granting it to the plaintiff, is reversible error.[765]

§ 629. Burden of Proof.

On the general principle that the party who relies upon an estoppel must establish it as a fact, it is held that, where parol evidence is introduced to show that the matters now in controversy were adjudicated and settled by a former judgment between the parties, the burden of proof is on the party setting up the estoppel.[766] Thus, where an action is brought for goods sold and on a note, and the

[763] Cunningham v. Foster, 49 Me. 68. And see Susquehanna Mut. Fire Ins. Co. v. Mardorf, 152 Pa. 22, 25 Atl. 234; Sans v. City of New York, 31 Misc. Rep. 559, 64 N. Y. Supp. 681; Palmer v. Sanger, 143 Ill. 34, 32 N. E. 390; West v. Moser, 49 Mo. App. 201.

[764] Perkins v. Parker, 10 Allen (Mass.) 22.

[765] Haak v. Breidenbach, 6 Bin. (Pa.) 12.

[766] Pruitt v. Holly, 73 Ala. 369; Hanchey v. Croskrey, 81 Ala. 149, 1 South. 259; McKnight v. Dunlop, 4 Barb. (N. Y.) 36; Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350; Bennett v. Holmes, 18 N. C. 486; Rowland v. Hobby, 26 App. Div. 522, 50 N. Y. Supp. 629; Eden v. Hartt, 25 Misc. Rep. 493, 54 N. Y. Supp. 1040; Holden v. O'Donohue, 61 Hun, 618, 15 N. Y. Supp. 402; Davis v. Sexton, 35 Ill. App. 407; Bond v. Markstrum, 102 Mich. 11, 60 N. W. 282; Grunert v. Spalding, 104 Wis. 193, 80 N. W. 589; Anderson v. Kreidler, 56 Neb. 171, 76 N. W. 581; Smalley v. Edey, 19 Ill. 207; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Van Valkenburgh v. City of Milwaukee, 43 Wis. 574.

defendant pleads a former recovery and gives in evidence the record of a former suit in which the claim was upon an account for goods sold, the burden is on the defendant to show that the note was included in the former judgment.[767] So a plaintiff claiming damages for flowage, and setting up a judgment as an estoppel to show that the flowage was wrongful, and relying upon facts not necessarily involved in the judgment, has the burden of proof on the question whether such facts formed the basis of the judgment.[768] But a difficulty arises in connection with those cases where the record shows that numerous issues were involved, or numerous questions litigated, in the former action, and the judgment does not clearly indicate whether one or more or all of them formed the basis of the decision. Here it is obviously necessary that the matter should be cleared up by extraneous evidence. But which of the parties must assume this duty? Several well considered cases hold that when a case is submitted to a jury, involving two or more issues, with evidence tending to sustain them all, and a general verdict is returned, such verdict is prima facie evidence that all the issues were found in favor of the prevailing party. And when, for example, a judgment on such verdict is presented by the defendant to defeat a recovery in a subsequent suit brought on the same cause of action, the burden is on the plaintiff to show that the issue now in controversy was not in fact settled by the former judgment, and therefore is not res judicata.[769] But this doctrine is opposed by some of the best authorities in the books. According to these decisions, if it appears from the record that several distinct matters may have been litigated, upon one or more of which the judgment was rendered, the whole subject-matter of the action will be at large and open to a new contention, unless the uncertainty be removed by extrinsic evidence showing the precise point involved and determined.[770] And this appears to be the better rule.

[767] Cummings v. Colgrove, 25 Pa. 150.

[768] Morgan v. Burr, 58 N. H. 470.

[769] White v. Simonds, 33 Vt. 178, 78 Am. Dec. 620; Hollis v. Morris, 2 Har. (Del.) 128; Day v. Vallette, 25 Ind. 42, 87 Am. Dec. 353; Rockwell v. Langley, 19 Pa. 502.

[770] Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Thompson v. N. T. Bushnell Co. (C. C.) 80 Fed. 332; Sawyer v. Woodbury, 7 Gray (Mass.) 499, 66 Am. Dec. 518; Chrisman's Adm'x v. Harman, 29 Grat. (Va.) 494, 26 Am.

§ 630. What Species of Evidence Receivable.

Under the rule admitting extrinsic evidence to identify the points decided by a former judgment, any proper and satisfactory proof will be receivable for that purpose. Often the party relies upon the record alone to furnish the required testimony, and in that case he should generally put the whole record in evidence, or at least so much of it, beside the judgment, as will show the litigation and decision of the question now at issue.[771] If he introduces the summons, to show the institution of the former action, and the judgment, to show its result, and it does not appear from these that the subject of the present suit was there involved and determined, the evidence is not conclusive.[772] To show a matter to be res judicata in the court of chancery, an exemplification of the bill, answer, and decree is sufficient evidence in a court of law without showing an actual enrollment of the decree.[773] In determining what has been adjudged, courts will regard the decree, and in case of ambiguity, but not otherwise, will be governed by an accompanying opinion.[774] But if the

Rep. 387; Ryan v. Potwin, 62 Ill. App. 134; Dygert v. Dygert, 4 Ind. App. 276, 29 N. E. 490.

[771] Lytle v. Chicago G. W. Ry. Co., 75 Minn. 330, 77 N. W. 975. In determining what was in fact decided, findings of fact filed by the court are not to be ignored, even though the statutes do not provide for such findings; on the contrary, the findings, if not conclusive as against all testimony, are at least to be regarded as very persuasive evidence of what the court decided. Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859. So, where the former judgment was rendered pursuant to the findings and conclusions of a referee, the court may examine the entire report of the referee, as well as the pleadings, for the purpose of ascertaining what issues were in fact raised and decided, and upon what theory the former judgment proceeded. Southern Minn. Ry. Extension Co. v. St. Paul & S. C. R. Co., 5 C. C. A. 249, 55 Fed. 690.

[772] Miller v. Deaver, 30 Ind. 371.

[773] Winans v. Dunham, 5 Wend. (N. Y.) 47.

[774] New Orleans, M. & C. R. Co. v. City of New Orleans (C. C.) 14 Fed. 373. But where (as in Michigan) constitutional or statutory provisions require the decisions of the supreme court to be in writing, signed by the judges, and filed in the clerk's office, the opinion of that court, so filed in a case, is competent evidence of the questions adjudicated therein, in a subsequent action wherein the decision is sought to be used as an estoppel. Stearns v. Lawrence, 28 C. C. A. 66, 83 Fed. 738. On the other hand, in

decree does not show upon which of several points in litigation it was based, but refers to the opinion of the trial judge, filed in the case, to explain what was determined and the reasons therefor, such opinion becomes a part of the record and must be looked to to determine the scope of the estoppel.[775] Where the answer of the defendant sets up the same defense as the answer in the former suit, admissions by counsel, in connection with the offer of the record as evidence, that testimony upon both defenses of the former action was admitted and went to the jury, relieves the uncertainty in the record and shows the prior determination of the present question.[776] But the briefs of counsel are not an unerring indication of the basis upon which the judgment was rendered, and their rejection, when offered to prove that the judgment was not a determination of the merits, is not necessarily error.[777] While the issues litigated at the trial may be shown by the testimony of persons who were present,[778] yet it is not generally permissible to give evidence, for that purpose, of what went on in the jury-room. "The secret deliberations of the jury," says the supreme court of the United States, "or grounds of their proceedings while engaged in making up their verdict, are not competent or admissible evidence of the issues or finding. The jurors oftentimes, though they may concur in the result, differ as to the grounds or reasons upon which they arrive at it. The evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for

California, a written opinion filed by the trial court in a case, being no part of the record, is not competent evidence to show what the issues were. Keech v. Beatty, 127 Cal. 177, 59 Pac. 837. And see Police Jury of Lafourche v. Police Jury of Terrebonne, 48 La. Ann. 1299, 20 South. 708.

[775] Legrand v. Rixey's Adm'r, 83 Va. 862, 3 S. E. 864.

[776] Merchants' International Steam-Boat Line v. Lyon (C. C.) 12 Fed. 63. But where the record of another suit is offered to show an estoppel as against the plaintiff in ejectment, recitals in a deed to the defendant from a third party are not evidence of the identity of the land sued for with the land referred to in the other suit. Garrison v. Tinley, 112 N. C. 652, 17 S. E. 423.

[777] Greenlee v. Lowing, 35 Mich. 63.

[778] Briggs v. Wells, 12 Barb. (N. Y.) 567. The deposition of the judge who tried the former action as to the issues therein tried is admissible, where the facts do not appear by the unaided record. Perkins v. Brazos, 66 Conn. 242, 33 Atl. 908.

their consideration, and then the record furnishes the only proper proof of the verdict." [779]

§ 631. Question of Law or Fact.

Upon a plea of former adjudication, the identity of the present with the former cause of action is a question of fact for the jury, to be determined by them upon the evidence adduced.[780] If, however, the question is determinable by inspection of the record alone, without the aid of extrinsic evidence, it is then a matter of law and is for the court. "What has been adjudicated in a prior suit is often a question of fact, which, on account of the looseness of our pleadings, has to be subjected to parol evidence and referred to a jury; but when it is determinable by the pleadings, it is always a question of law for the court." [781] Where there is no question raised on the second trial as to the identity of the matters in controversy in the two suits, but the only question is as to the effect which ought to be given to the former judgment, it should not be submitted to the jury to determine whether the matter in issue in the second suit was passed upon in the former.[782]

[779] Washington, A. & G. Steam Packet Co. v. Sickles, 5 Wall. 580, 18 L. Ed. 550. See, also, Rockwell v. Langley, 19 Pa. 502.

[780] Amsden v. Dubuque & S. C. R. Co., 32 Iowa, 288; Tutt v. Price, 7 Mo. App. 194; Birdseye v. Shaeffer (Tex. Civ. App.) 57 S. W. 987; Otis v. Sweeney, 43 La. Ann. 1073, 10 South. 247.

[781] Bitzer v. Killinger, 46 Pa. 44; Finley v. Hanbest, 30 Pa. 190; Coulter v. Davis, 13 Lea (Tenn.) 451; Tutt v. Price, 7 Mo. App. 194; New York & T. Land Co. v. Votaw (Tex. Civ. App.) 52 S. W. 125. A plea of former judgment in bar, replied to by "No such judgment," should be tried by an inspection of the record by the court. Davis v. Trump, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849.

[782] Ehle v. Bingham, 7 Barb. (N. Y.) 494; Mum v. Shannon, 86 Iowa, 363, 53 N. W. 263. Where, in an action on a note by an assignee, the maker pleads a judgment rendered against him as garnishee in an action against plaintiff's assignor, in which the plaintiff was not a party, the question whether plaintiff did not in fact defend in the garnishment suit, so as to render the judgment binding upon him, the evidence being conflicting, is for the jury. Wolverton v. Glasscock, 15 Wash. 279, 46 Pac. 253.

§ 632. Inconsistent Positions in Litigation.

Before leaving this branch of the general subject it is necessary to notice a rule of law which, although it is not strictly a part of the doctrine of estoppel by judgment, is founded on principles closely analogous to those we have been considering. It is the rule which forbids a party to assume successive positions, in the course of a suit or series of suits, in reference to the same fact or state of facts, which are inconsistent with each other or mutually contradictory.[783] To illustrate,—where, in an action for the specific performance of a contract for the sale of real estate, a judgment is rendered on the merits in favor of the defendant, this judgment will bar another action to reform the contract and to enforce it as reformed; for where a party elects to sue upon a written contract as executed, and the action proceeds to trial and judgment, he is bound by his election and cannot thereafter bring an action to reform the contract.[784] So where the plaintiffs in a proceeding against the owner and contractor to foreclose mechanics' liens on a building, towards the erection of which they had furnished work and materials, pleaded that they had done so under a sub-contract with the contractor, it was held that the judgment in that proceeding, deciding that the plaintiffs had furnished such work and materials at the request of the contractor, was a bar to a subsequent action by them against the owner to recover for the same work and materials upon the allegation that they had been furnished at the owner's request.[785] For another example,—in an action by the payee of a note against the maker, the defendant pleaded that the note had been indorsed by the payee, and that the indorsee had sued the defendant on the note, but it appeared that in that suit the maker objected to the

[783] Lilley v. Adams, 108 Mass. 50; Hanley v. Foley, 18 B. Mon. (Ky.) 519; Louisiana Levee Co. v. State, 31 La. Ann. 250; Himmelmann v. Sullivan, 40 Cal. 125; Jefferies v. Allen, 34 S. C. 189, 13 S. E. 365; Gee v. Burt (Tex. Civ. App.) 33 S. W. 553; Holt v. Schneider, 61 Neb. 370, 85 N. W. 280; Miller v. Bailey, 19 Or. 539, 25 Pac. 27.

[784] Thomas v. Joslyn, 36 Minn. 1, 29 N. W. 344, 1 Am. St. Rep. 624. See, also, Martin v. Boyce, 49 Mich. 122, 13 N. W. 386; Buckmaster v. Grundy, 3 Gilman (Ill.) 626.

[785] Toope v. Prigge, 7 Daly (N. Y.) 208.

title of the indorsee, or to some defect in the indorsement, in consequence of which no recovery was had on the note. It was accordingly held that the plea was no bar, and that the defendant could not in this suit set up the indorsement as good, which he had in a former suit shown, or attempted to show, to be bad.[786] And it is a general rule that a party who has obtained the benefit of a contract in one suit is estopped to deny its validity in a subsequent suit.[787] On the same principle, the holder of a promissory note, secured by an instrument purporting to be a deed to land, who, under an allegation that the instrument in question is a deed, obtains a judgment embracing a special lien upon the land, cannot afterwards allege that the instrument securing the debt is not in fact a deed passing title, but a mortgage only.[788] But it is held in some of the cases that a party who alleges, but fails to establish a certain state of facts, is not estopped in a subsequent suit, between the same parties, and concerning the same subject-matter, from alleging a different and inconsistent state of facts.[789]

PART VI. CONCLUSIVENESS OF PROBATE ADJUDICATIONS.

§ 633. Probate Decrees Binding.

In most, if not all, of the states it is now a well settled rule that the judgments or orders of the probate court, when acting within the scope of its peculiar jurisdiction, are final and conclusive upon the parties and privies (and when the adjudication is in rem, then upon all persons), until reversed or set aside by some appropriate proceeding, and not open to collateral attack or re-examination in the same or any other court.[790] Thus in Pennsylvania, the orphans'

[786] McDonald v. Rainor, 8 Johns. (N. Y.) 442.

[787] Baltimore & O. Ry. Co. v. Pittsburgh, C. & St. L. Ry. Co. (C. C.) 55 Fed. 701; Ellis v. The Lyceum, 62 Hun, 622, 16 N. Y. Supp. 924.

[788] McCandless v. Yorkshire Guarantee & Securities Corp., 101 Ga. 180, 28 S. E. 663.

[789] McQueen's Appeal, 104 Pa. 595, 49 Am. Rep. 592. See Chaffe v. Morgan, 30 La. Ann. 1307.

[790] Caujolle v. Curtiss, 13 Wall. 465, 20 L. Ed. 507; Simpson v. Norton, 45 Me. 281; Bryant v. Allen, 6 N. H. 116; Spofford v. Smith, 59 N. H. 366; Simmons v. Goodell, 63 N. H. 458, 2 Atl. 897; Adams' Heirs v. Adams, 22 Vt. 50;

court is a court of record of equal dignity with the common law tribunals, and its decrees, as to matters within its jurisdiction, are conclusive upon parties and privies against all collateral impeachment except for fraud.[791] So in Georgia, the probate courts are courts of original, general, and exclusive jurisdiction with respect to the estates of decedents, and not of special or limited jurisdiction.[792] The character of conclusiveness is attached to their judgments by the decisions in Maryland.[793] So in South Carolina, the

Lawrence v. Englesby, 24 Vt. 42; Jennison v. Hapgood, 7 Pick. (Mass.) 1, 19 Am. Dec. 258; Paine v. Stone, 10 Pick. (Mass.) 75; Sever v. Russell, 4 Cush. (Mass.) 513, 50 Am. Dec. 811; Crippen v. Dexter, 13 Gray (Mass.) 330; Cummings v. Cummings, 123 Mass. 270; Watts v. Watts, 160 Mass. 464, 36 N. E. 479, 23 L. R. A. 187, 39 Am. St. Rep. 509; Bush v. Sheldon, 1 Day (Conn.) 170; Goodrich v. Thompson, 4 Day (Conn.) 215; Gates v. Treat, 17 Conn. 388; Dickinson v. Hayes, 31 Conn. 417; Kellogg v. Johnson, 38 Conn. 269; Blake v. Butler, 10 R. I. 133; King v. Ross, 21 R. I. 413, 45 Atl. 146; Roach v. Martin's Lessee, 1 Har. (Del.) 548, 28 Am. Dec. 746; Seymour v. Seymour, 4 Johns. Ch. (N. Y.) 409; Chipman v. Montgomery, 63 N. Y. 236; Thompson v. McGaw, 2 Watts (Pa.) 161; McPherson v. Cunliff, 11 Serg. & R. (Pa.) 422, 14 Am. Dec. 642; Lex's Appeal, 97 Pa. 289; In re Brinton's Estate, 10 Pa. 408; Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626; Connolly v. Connolly, 32 Grat. (Va.) 657; Harris v. Colquit, 44 Ga. 663; Davie v. McDaniel, 47 Ga. 195; King v. Smith, 15 Ala. 264; Herbert v. Hanrick, 16 Ala. 581; Arnett's Ex'r v. Arnett, 33 Ala. 273; Duckworth v. Duckworth's Adm'r, 35 Ala. 70; Morrow v. Allison, 39 Ala. 70; Hutton v. Williams, 60 Ala. 107; Turner v. Malone, 24 S. C. 298; Bailey v. Dilworth, 10 Smedes & M. (Miss.) 494, 48 Am. Dec. 760; Fort v. Battle, 13 Smedes & M. (Miss.) 133; McKee v. Whitten, 25 Miss. 31; Ward v. State, 40 Miss. 108; Womack v. Womack, 23 La. Ann. 351; Dooley v. Dooley, 14 Ark. 122; Osborne v. Graham, 30 Ark. 67; Gordon v. Kennedy, 36 Iowa, 167; Johnson v. Beazley, 65 Mo. 250, 27 Am. Rep. 276; Sheetz v. Kirtley, 62 Mo. 417; Covington v. Chamblin, 156 Mo. 574, 57 S. W. 728; Williams v. Reed, 74 Mo. App. 331; Huebschmann v. Cotzhausen, 107 Wis. 64, 82 N. W. 720; Dayton v. Mintzer, 22 Minn. 393; Garwood v. Garwood, 29 Cal. 514; Kingsley v. Miller, 45 Cal. 95; Reynolds v. Brumagim, 54 Cal. 254.

[791] McPherson v. Cunliff, 11 Serg. & R. (Pa.) 422, 14 Am. Dec. 642. This is the leading case in Pennsylvania, and has been followed in innumerable decisions since its date (1824), and its principles became statute law by Act of March 29, 1832. See Mussleman's Appeal, 65 Pa. 485, for remarks upon it, and for a review of the history of the orphans' court in that state.

[792] Davie v. McDaniel, 47 Ga. 195.

[793] Cecil v. Cecil, 19 Md. 72, 79, 81 Am. Dec. 626. In this case it was said: "In regard to the decrees and sentences of courts exercising any branches of ecclesiastical jurisdiction, the same general principles govern which we have already stated. The principal branch of this jurisdiction in existence in the United States is that which relates to matters of probate and administration.

court of probate, though of limited jurisdiction, is a court of record with very large powers, and as to proceedings clearly within its jurisdiction, it is not to be regarded as an inferior court in respect to the dignity of its records.[794] In California, the probate court is regarded as an inferior court, and it cannot take jurisdiction or administer remedies except as provided by statute;[795] yet its adjudications upon matters which are within its jurisdiction, are binding and conclusive.[796] And that the same doctrine obtains in a great majority of the other states, however much their laws may differ as to the rank of this court or the scope of its jurisdiction, is abundantly testified by the authorities already cited.

But it must always be remembered that in order to the conclusiveness of a probate decree,—as in the case of a sentence emanating from any other tribunal,—it is absolutely necessary that the court should have possessed jurisdiction. There must be jurisdiction of the subject-matter of the proceeding;[797] and the court must have acquired jurisdiction of the persons to be affected, by service or publication of notice, or otherwise according to the statute.[798] Whether the validity of the decree will be sustained by the presumptions of jurisdiction and regularity which are extended to the judgments of ordinary courts of record, or whether the proceedings must show jurisdiction on their face in order to be accounted valid, will

And as to these, the inquiry, as in other cases, is, whether the matter was exclusively within the jurisdiction of the court and whether a decree or judgment has directly been passed upon it. If the affirmative be true, the decree is conclusive. Where the decree is of the nature of proceedings in rem, as is generally the case in matters of probate and administration, it is conclusive, like those proceedings, against all the world. But where it is a matter of exclusively private litigation, such as in assignments of dower and some other cases of jurisdiction conferred by particular statutes, the decree stands upon the footing of a judgment at common law."

[794] Turner v. Malone, 24 S. C. 398.

[795] Grimes' Estate v. Norris, 6 Cal. 621, 65 Am. Dec. 545.

[796] Garwood v. Garwood, 29 Cal. 514; Kingsley v. Miller, 45 Cal. 95; Reynolds v. Brumagim, 54 Cal. 254.

[797] Gordon v. Kennedy, 36 Iowa, 167; Wright v. Wright, 99 Mich. 170, 58 N. W. 54, 23 L. R. A. 196; Arnegaard v. Arnegaard, 7 N. D. 475, 75 N. W. 797, 41 L. R. A. 258.

[798] Mickel v. Hicks, 19 Kan. 578, 21 Am. Rep. 161; Crosley v. Calhoon, 45 Iowa, 557; Dallinger v. Richardson, 176 Mass. 77, 57 N. E. 224.

depend upon the further question whether, in the particular state, the probate court is ranked as a technically "inferior" court or otherwise. The principles of this distinction have already been examined.[799] It is further to be remarked that in many of the states statutes have been enacted which materially change the common law rules as to the parties who are bound by probate decrees, or which provide a certain period during which the probate shall be open to contest, or prescribe cases in which it may be revised in chancery, or require certain persons to be cited in, or that public notice be given. Our observations in this connection are subject to modification according to the tenor of such statutes where they exist. But since this is largely a matter of practice it is not deemed necessary to enter upon an extended discussion of these enactments.

§ 634. When Impeachable for Fraud.

It was stated in an earlier section [800] that the question whether the judgment of a competent court can be collaterally impeached by parties or privies on the ground of fraud practised in its procurement, must be regarded as still unsettled upon the authorities. The adjudications of probate courts, in this respect, stand upon a somewhat peculiar footing. The attempt to overthrow them collaterally is usually made in invoking the aid of a court of equity. In England it has been held from early times that the court of chancery has no power to set aside or disregard a lawful decree of the probate court even on the ground of fraud; [801] although the opinion has been intimated that equity might afford relief in a case where the fraud alleged had been practised in procuring the probate of a will, as distinguished from fraud practised upon the testator.[802] In this country we have a few rulings and some dicta

[799] Supra, vol. 1, §§ 270, 282–284.

[800] Supra, vol. 1, §§ 290–295.

[801] Meadows v. Duchess of Kingston, Ambl. 756; Noell v. Wells, Lev. 235; Allen v. Macpherson, 1 H. L. Cas. 191; Hindson v. Weatherill, 5 De Gex, M. & G. 301; Jones v. Gregory, 2 De Gex, J. & S. 83; Barnesley v. Powell, Ambl. 102.

[802] Barnesley v. Powell, 1 Ves. Sr. 284; Kennell v. Abbott, 4 Ves. 802; Bigelow, Estop. pp. 157–160.

to the effect that fraud may be collaterally alleged against the order or judgment of a probate court.[803] But where a party relies upon fraud, it is said, it ought to be distinctly and positively alleged, and not merely inferred from circumstances.[804]

§ 635. Probate of a Will.

The action of a probate court having jurisdiction, in admitting a will to probate or in rejecting it, is in the nature of a proceeding in rem, and so long as it remains in force, it is conclusive as to the due execution and the validity of the will, both upon all the parties who may be before the court and upon all other persons whatever, in all proceedings arising out of the will or where the parties claim under or are connected with it.[805] "The proceeding," says the supreme court of Vermont, "is in form and substance upon the will itself. No process is issued against any one, but all persons interested in determining the state or condition of the instrument are constructively notified, by a newspaper publication, to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money or do any particular act, but that the instrument is, or is not, the will of the testator. It determines the status of the subject-matter of the proceeding. The judgment is upon the thing itself; and when the proper steps required by

[803] President of Orphans' Court v. Groff, 14 Serg. & R. (Pa.) 181; McPherson v. Cunliff, 11 Serg. & R. (Pa.) 422, 14 Am. Dec. 642; Tebbets v. Tilton, 24 N. H. 120; Kilgore v. Kilgore, 103 Ala. 614, 15 South. 897.

[804] President of Orphans' Court v. Groff, 14 Serg. & R. (Pa.) 181.

[805] Noell v. Wells, Lev. 235; Allen v. Dundas, 3 T. R. 125; Plume v. Beale, 1 P. Wms. 388; Allen v. Macpherson, 1 H. L. Cas. 191; Archer v. Mosse, 2 Vern. 8; Potter v. Webb, 2 Me. 257; Woodruff v. Taylor, 20 Vt. 65; Parker v. Parker, 11 Cush. (Mass.) 524; Loring v. Arnold, 15 R. I. 428, 8 Atl. 335; Tozer v. Jackson, 164 Pa. 373, 30 Atl. 400; Carpenter v. Cameron, 7 Watts (Pa.) 51; Holliday v. Ward, 19 Pa. 485, 57 Am. Dec. 671; Lovett's Ex'rs v. Mathews, 24 Pa. 330; Loy v. Kennedy, 1 Watts & S. (Pa.) 396; Hegarty's Appeal, 75 Pa. 503; Whitaker's Estate, 10 Wkly. Notes Cas. (Pa.) 106; Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626; Davis v. Blevins, 123 N. C. 379, 31 S. E. 826; Schultz v. Schultz, 10 Grat. (Va.) 358, 60 Am. Dec. 335; Ballow v. Hudson, 13 Grat. (Va.) 682; Norvell v. Lessueur, 33 Grat. (Va.) 222; Wills v. Spraggins, 3 Grat. (Va.) 555; Sawyer v. Dozier's Heirs, 27 N. C. 97; Anderson v. Green, 46 Ga. 361; Deslonde v. Darrington's Heirs, 29 Ala. 92; Brock's Adm'r v. Frank, 51 Ala. 85; Steele v. Renn, 50 Tex. 467, 32 Am. Rep. 605; Moore v. Tanner's Adm'r, 5 T.

law are taken, the judgment is conclusive, and makes the instrument, as to all the world (at least so far as the property of the testator within this state is concerned), just what the judgment declares it to be."[806] Among the points or questions settled by the admission of the will to probate, is first to be reckoned the capacity of the testator. Thus, the decision of the probate court upon the will of a married woman is conclusive as to her capacity to make a will, and as to its due execution, and as to the assent of the husband where such assent is necessary to give it effect.[807] So also the probate is conclusive of the sanity of the testator,[808] and of all other questions affecting his competence. Again, the probate is conclusive as to the due execution of the will. The decree of a probate court, for example, declaring a will of personal property to be duly executed, is conclusive evidence of such execution, in a collateral action, notwithstanding it be shown that there was but a single subscribing witness to the will.[809] So the decision of the probate court as to the sufficiency of a revenue stamp attached to a testamentary document and depending on the value of the estate, is final and cannot be questioned collaterally.[810] Next, the probate is conclusive of the genuineness of the instrument passed upon. A judgment admitting a will to probate cannot be attacked collaterally although the will was forged; and a payment to the executor named therein of a debt due the decedent

B. Mon. (Ky.) 42, 27 Am. Dec. 35; Bowen v. Allen, 113 Ill. 53, 55 Am. Rep. 398; Jourden v. Meier, 31 Mo. 40; State v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118; Hubbard v. Hubbard, 7 Or. 42.

[806] Woodruff v. Taylor, 20 Vt. 65.

[807] Cutter v. Butler, 25 N. H. 343, 57 Am. Dec. 330; Cassels v. Vernon, 5 Mason, 332, Fed. Cas. No. 2,503. And see Barnes v. Vincent, 5 Moore, P. C. 201.

[808] Roach v. Martin's Lessee, 1 Har. (Del.) 548, 28 Am. Dec. 746; Town of Poplin v. Town of Hawke, 8 N. H. 124; Sly v. Hunt, 159 Mass. 151, 34 N. E. 187, 21 L. R. A. 680, 38 Am. St. Rep. 403. But a decree of the probate court refusing probate of a will, on the ground of the mental incapacity of the testator, is only prima facie evidence of such incapacity, as against the grantee in a deed executed by the testator on the same day he made the will. Baxter v. Baxter, 76 Hun, 98, 27 N. Y. Supp. 834. And see Arnold's Devisees v. Arnold's Ex'rs (Ky.) 16 S. W. 585.

[809] Vanderpoel v. Van Valkenburgh, 6 N. Y. 100; Succession of Justus, 45 La. Ann. 190, 12 South. 130. Compare Robertson v. Caw, 3 Barb. (N. Y.) 410.

[810] Satterlee v. Bliss, 36 Cal. 489.

will discharge the same, notwithstanding the spurious character of the instrument probated.[811] It has also been held that, upon an indictment for forging a will, the probate of the paper in question is conclusive evidence in the defendant's favor of its genuine character.[812] But this particular point has lately been ruled otherwise.[813] It is also approved doctrine that the sentence of probate in the proper tribunal of the testator's domicile is, in the absence of statutory provisions, conclusive everywhere as to the capacity of the testator and the due execution and validity of the will, as regards personalty; and though ancillary probate may be necessary to enable the will to operate in another jurisdiction, it will be granted as a matter of right, when the original probate is shown to have been granted by a court of competent jurisdiction, and it is properly authenticated.[814]

But, as in every other case of an estoppel by judgment, the probate is conclusive of such matters only as are necessarily involved in it, or necessary to be determined in order that the decree might be made. The probate is conclusive evidence that the will "was duly executed by the person whose will it purports to be, and that such person had legal capacity to execute it. But the probate decides nothing beyond this. The legal effect of the will or of its various provisions, its construction and operation, do not come in question and cannot be passed upon on an application to admit the will to probate. It makes no difference that there is but one devise in it. The probate does not assume to determine the validity of such devise, but only that the instrument presented for probate was executed as his last will and testament by the testator, in the manner prescribed by statute, and that he was legally competent to make a will."[815] Further, letters testamentary and the proof of a will before a probate court are only evidence in proceedings

[811] Moore v. Tanner's Adm'r, 5 T. B. Mon. 42, 27 Am. Dec. 35; Roach v. Martin's Lessee, 1 Har. (Del.) 548, 28 Am. Dec. 746; Noell v. Wells, Lev. 235; Allen v. Dundas, 3 T. R. 125.

[812] Rex v. Vincent, 1 Strange, 481.

[813] Rex v. Butterly, Russ. & R. 342.

[814] Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13.

[815] Greenwood v. Murray, 26 Minn. 259, 2 N. W. 945; Craine v. Edwards, 92 Ky. 109, 17 S. W. 211.

arising out of the will, or where the parties claim under or are connected with it. Thus, in an action for the admeasurement of dower, a surrogate's record of probate of the last will and testament of the husband of the plaintiff is not competent evidence to prove the death of the husband. A widow's right of dower has no connection with, and is not affected by, the will of her deceased husband or by the adjudication of the surrogate thereon. Proof of the probate of the will, therefore, is entirely immaterial in such an action, and does not tend to establish prima facie the fact of death.[816]

§ 636. Conclusiveness of Probate as to Realty.

By the common law of England, the probate of a will by the proper ecclesiastical court was conclusive as to the personalty, but it was not evidence at all in respect to the real estate, inasmuch as the court had no jurisdiction except over wills of personal property.[817] "There was in fact no such thing as a probate of wills of land, properly speaking. The probate was not evidence of title to land. The will alone is evidence, and that must be proved, on the occasion, in the same manner as any other muniment of title." [818] And this distinction was recognized and applied, in early times, in some of our states. Thus in Pennsylvania it was a well settled rule of law until 1856.[819] But in that year a statute was passed making the probate of a will of real estate conclusive, unless, within five years from the date of probate, the validity of the will should be contested in the manner pointed out in the statute.[820] And now in many of the states there are laws giving to courts of probate the same power over the probate of wills of realty as of personal estate, and in such case their decrees are equally conclusive on the validity and due execution of such wills.[821] But a judgment ad-

[816] Carroll v. Carroll, 60 N. Y. 121, 19 Am. Rep. 144.

[817] Doe v. Calvert, 2 Camp. 389; Tompkins v. Tompkins, 1 Story, 547, Fed. Cas. No. 14,091.

[818] Rowland v. Evans, 6 Pa. 435, per Lowrie, J.

[819] Asay v. Hoover, 5 Pa. 21, 45 Am. Dec. 713; Spangler v. Rambler, 4 Serg. & R. (Pa.) 192; Smith v. Bonsall, 5 Rawle (Pa.) 86; Rowland v. Evans, 6 Pa. 435.

[820] Folmar's Appeal, 68 Pa. 482; Act Pa. April 22, 1856.

[821] Parker v. Parker, 11 Cush. (Mass.) 519, 524; Judson v. Lake, 3 Day

mitting a will to probate in one state is not conclusive of its validity as a testament devising realty in another state, unless permitted by the laws of the latter state. For real estate is governed by the lex loci rei sitæ, and all questions concerning it, including the validity of a will by which it is devised, must be determined by that law.[822]

§ 637. Effect of Rejection of Will.

"When a will has been propounded by a party interested, and fairly rejected on the merits, it would defeat the policy of the law, and be productive of many mischiefs, if it could be again propounded by the same party or by others who might be interested, and the contest thus renewed from time to time. The sentence, therefore, against the will must be regarded as a sentence against all claiming under it. It stands upon a footing analogous to the cases known as judgments in rem, which, being adjudications upon the subject-matter, are regarded as final and conclusive, not only in the courts in which they are pronounced, but in all others in which the same question arises. . . . . It is true there is a marked distinction between a sentence for and a sentence against a will, where it is propounded ex parte for probate in the first instance. In the former case, the sentence is binding and effectual for all legal purposes while it remains in force, but it is liable to be set aside by a proceeding in chancery provided by our statute, and in it nothing is concluded by the sentence of probate." [823]

§ 638. Parties bound by Probate.

In respect to the parties concluded by a decree admitting a will to probate or rejecting it, there was, at common law, a very important distinction founded on the question whether the document was probated in "common form" or in "solemn form." Probate

(Conn.) 318; Scott v. Calvit, 3 How. (Miss.) 148; Brock's Adm'r v. Frank, 51 Ala. 85; Norvell v. Lessueur, 33 Grat. (Va.) 222; Inhabitants of Dublin v. Chadbourn, 16 Mass. 433.

[822] Robertson v. Pickrell, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049. See, also, Story, Confl. Laws, § 474.

[823] Schultz v. Schultz, 10 Grat. (Va.) 358, 60 Am. Dec. 335. See, also, Laughton v. Atkins, 1 Pick. (Mass.) 535.

in common form was where the will was admitted to probate in proceedings to which the executor alone was a party, and this was conclusive only upon the executor and those in privity with him. Legatees claiming under the will are in privity with the executor, and consequently, if the will was rejected, it could not be re-propounded by either the executor or legatees. But heirs and devisees are not in privity with the executor, and not concluded by probate in this form. Hence, if the will was rejected, a devisee might still maintain ejectment on it. Probate in solemn form was where the executor had called in the parties interested, by a summons "to see proceedings" and to take part therein as they may see fit, and this was conclusive upon all parties summoned, whether they appeared or not, and regardless of their privity or want of privity with the executor. It conclusively established the validity and due execution of the will, at least so far as regards the personal estate.[824] This distinction appears to be still preserved in a few of our states.[825] But as a general rule, in this country and at this day, the statutes so completely regulate the matter of proving wills as to leave but little to be determined by the rules or principles of the ancient law. And these statutes (notwithstanding some differences of detail) are generally so framed as to make the proceeding for proving a will, which they provide, practically equivalent to the probate in "solemn form." Notice is given to all persons concerned, usually by newspaper publication, to appear and take part in the proceedings. And on account of this constructive service, and also because the proceeding is regarded as being in rem, the probate is conclusive upon all persons, as may be seen by the authorities cited in preceding sections. A judgment in rem is commonly said to be binding on "all the world." This, however, is a very vague phrase. As applied to probate proceedings it must be understood to mean "all persons interested in the will, who, being constructively notified to appear at the probate, might have come

[824] Redmond v. Collins, 15 N. C. 430, 27 Am. Dec. 208.

[825] Wall v. Wall, 30 Miss. 91, 64 Am. Dec. 147. By the Georgia Code (1882) § 2425, probate of a will in common form, if unattacked for seven years, is conclusive upon all parties in interest except minor heirs at law. Anderson v. Green, 46 Ga. 361.

in, and who, had they come in, might have been heard for or against the will." A defendant who was not a party to a proceeding in a probate court upon a will, in any such sense that he might be heard or take an appeal, is not concluded by the adjudication.[826] It is true that a probate decree is in rem; but the practical importance of that fact lies in this,—that it dispenses with the necessity of personal notice to all parties concerned.

But it is further necessary to inquire how the case stands in respect to persons under legal disabilities. In Pennsylvania it is held that the probate of a will, unless contested within the time and in the manner provided by statute, is conclusive upon all persons, including infants, married women, and lunatics.[827] And probably the same doctrine obtains in some other states, although the opinion has been expressed that an infant would not be bound by the probate unless duly represented by a guardian, and this although the statute is silent on the subject.[828] But most commonly the statutes favor such persons with a limited period, after the removal of their disabilities, within which they may appear and contest the adjudication. It is further to be remarked that a proceeding to contest a will already probated, brought under a statute allowing such action within a certain time after the act of probate, is a different thing from the probate itself. Such a proceeding, in general, binds only the parties to it; and although such parties, as between themselves, are estopped from setting up a will when it has once been set aside by such a proceeding, yet, as to all other persons in interest, it is to be regarded as a still subsisting will, and their rights stand wholly unaffected by the judgment.[829]

§ 638a. Construction of Will.

Where an action is brought for the judicial construction of a will (in a court of probate, if the statutes give those courts juris-

[826] Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. 265.

[827] Folmar's Appeal, 68 Pa. 482; Warfield v. Fox, 53 Pa. 382.

[828] O'Dell v. Rogers, 44 Wis. 136, 173. On the general subject of the validity of judgments against persons under disabilities, see supra, vol. 1, §§ 188–205.

[829] Holt v. Lamb, 17 Ohio St. 374; Valsain v. Cloutier, 3 La. 170, 22 Am. Dec. 179.

diction of such proceedings, or in any other competent court), the judgment rendered therein is conclusive and binding on all parties who were properly before the court.[830] Thus, a decree construing a will, finding that the lands therein disposed of are personalty, to be sold and divided, is a bar to an action by the beneficiaries under the will for partition of the real estate.[831] But such a judgment is not conclusive upon any interested parties who were not brought into the action in some proper manner,[832] and it does not finally determine the status of any property (or the rights of parties in or concerning any property) other than that involved in the parts of the will as to which construction is asked.[833]

§ 639. Appointment of Administrator.

The granting of letters of administration is a matter resting within the exclusive jurisdiction of the probate court, and its action therein is conclusive and binding, and its legality cannot be questioned in any other court, nor collaterally impeached for irregularity.[834] Thus, where a state statute provides that administration of an intestate estate shall be granted by the county court, when the intestate "at or immediately before his death, was an inhabitant of the county," etc., the decision of that court upon the question of inhabitancy, properly presented for its adjudication, is not open to examination in a subsequent proceeding in a federal court.[835] So, where the

[830] John v. Smith (C. C.) 91 Fed. 827; Leavens v. Ewins, 67 Vt. 256, 31 Atl. 297; Allen v. Shepard, 11 N. Y. St. Rep. 561; Corprew v. Corprew, 84 Va. 599, 5 S. E. 798; Malona v. Schwing (Ky.) 39 S. W. 523; Westbrook v. Thompson, 104 Tenn. 363, 58 S. W. 223.

[831] Stoff v. McGinn, 178 Ill. 46, 52 N. E. 1048.

[832] Morgan v. Halsey (Ky.) 31 S. W. 866. But where a devisee has actual notice of the pendency of proceedings for the construction of the will, which involved his right to an annuity, he will be bound by the decree therein, though the service of process was defective. Westbrook v. Thompson, 104 Tenn. 363, 58 S. W. 223.

[833] Malona v. Schwing (Ky.) 39 S. W. 523; Gaffield v. Plumber, 175 Ill. 521, 51 N. E. 749.

[834] McFarland v. Stone, 17 Vt. 165, 44 Am. Dec. 325; Lawrence v. Englesby, 24 Vt. 42; Naylor's Adm'r v. Moffatt, 29 Mo. 126; Savage v. Benham, 17 Ala. 119; Palmer v. Oakley, 2 Doug. (Mich.) 433, 47 Am. Dec. 41.

[835] Holmes v. Oregon & C. R. Co. (C. C.) 9 Fed. 229; Appeal of Willetts, 50 Conn. 330.

grant of administration turns on the question as to which of the parties is next of kin to the decedent, the judgment is conclusive on that question in a suit between the same parties for distribution.[836] But on the other hand, it is held that an appointment of an administrator, not followed by his qualification or acceptance of the duties of the position, does not adjudicate the question of assets in the county so as to bind the parties in interest on a subsequent petition for the appointment of another person as administrator.[837]

§ 640. Grant of Administration no Proof of Death.

There is one important exception to the rule of conclusiveness attaching to a decree of the probate court appointing an administrator. The grant of letters of administration is not conclusive, even between parties and privies, of the fact of the death of the alleged decedent. The letters amount only to prima facie proof of the title of the administrator, but may be invalidated by showing that the person is not in fact dead.[838] The supreme court of the United States holds that letters of administration are not admissible as evidence, in proof of death, in a suit brought by a plaintiff in his individual character, and not as administrator, to recover a claim on a policy of life insurance, the right of action depending on the death of the third person whose life the policy insured.[839] And whereas it was suggested, in the case cited, that it was a judgment in rem, the court replied: "The probate court has never adjudicated that A. was dead. Death was not the res presented to it. Shall B. receive letters of administration?—was the res, and upon that only has there been an adjudication." [840] In New York and New

[836] Garwood v. Garwood, 29 Cal. 514; Howell v. Budd, 91 Cal. 342, 27 Pac. 747.

[837] In re Shaw's Estate, 81 Me. 207, 16 Atl. 662.

[838] Clayton v. Gresham, 10 Ves. 288; Thompson v. Donaldson, 3 Esp. 63; Moons v. De Bernales, 1 Russ. 301; Newman v. Jenkins, 10 Pick. (Mass.) 515; Jochumsen v. Suffolk Sav. Bank, 3 Allen (Mass.) 87; Cunningham v. Smith's Adm'r, 70 Pa. 458; French v. Frazier's Adm'r, 7 J. J. Marsh. (Ky.) 425; English's Adm'r v. Murray, 13 Tex. 366; Tisdale v. Connecticut Mut. Life Ins. Co., 26 Iowa, 170, 96 Am. Dec. 136; Lancaster v. Washington Life Ins. Co., 62 Mo. 121.

[839] Mutual Benefit Life Ins. Co. v. Tisdale, 91 U. S. 238, 23 L. Ed. 314.

[840] See 1 Whart. Ev. § 810; 2 Phil. Ev. 93.

Jersey, this doctrine is not fully accepted. It is there held that the inquiry by the surrogate as to the death of the person upon whose estate administration is applied for, is judicial in its nature; that the surrogate has jurisdiction to determine it upon sufficient evidence; and that letters issued by him upon due proof are conclusive evidence of the authority of the administrator to act, until the order granting them is reversed on appeal, or the letters are revoked or vacated, so far at least as to protect innocent persons acting upon the faith of them.[841]

§ 641. Allowance or Rejection of Claims.

In a few states it appears to be settled law that the action of a probate court upon a claim against the estate, presented for its consideration, is not in the nature of a judgment and therefore not conclusive.[842] But it is most generally the rule that the allowance of a claim against the estate of a decedent is a judicial act, and has all the force and effect of a judgment; that is, it is final and conclusive, as between the parties, until reversed or set aside, and cannot be attacked collaterally.[843] Thus a decree of the probate court, in the

[841] Roderigas v. East River Sav. Inst., 63 N. Y. 460, 20 Am. Rep. 555; Plume v. Howard Sav. Inst., 46 N. J. Law, 211.

[842] State v. Bowen, 45 Miss. 347; Levering v. Levering, 64 Md. 399, 2 Atl. 1.

[843] Kendall v. Hardenbergh (C. C.) 94 Fed. 911; Campbell v. Strong, Hemp. 265, Fed. Cas. No. 2,367a; Wilcox v. Gilchrist, 85 Hun, 1, 32 N. Y. Supp. 608; In re Bradley, 25 Misc. Rep. 261, 54 N. Y. Supp. 555; Neill v. Hodge, 5 Tex. 489; Moore v. Hillebrant, 14 Tex. 312, 65 Am. Dec. 118; Giddings v. Steele, 28 Tex. 756, 91 Am. Dec. 336; Cannon v. McDaniel, 46 Tex. 309; Swan v. House, 50 Tex. 650; Ford v. Newcomer, 14 La. Ann. 706; Shoemaker v. Brown, 10 Kan. 383; Dooley v. Watkins, 5 Ark. 705; Cossitt v. Biscoe, 12 Ark. 97; Biscoe v. Butts, 5 Ark. 305; Carter v. Engles, 35 Ark. 205; Brown v. Darrah, 95 Ind. 86; City of La Porte v. Organ, 5 Ind. App. 369, 32 N. E. 342; Tarplee v. Capp, 25 Ind. App. 56, 56 N. E. 270; Mason v. Bair, 33 Ill. 194; Snelling v. Kroger, 89 Iowa, 247, 56 N. W. 446; Gault v. Sickles, 85 Iowa, 266, 52 N. W. 206; Kennerly v. Shepley, 15 Mo. 640, 57 Am. Dec. 219; Jones v. Brinker, 20 Mo. 87; Tutt v. Boyer, 51 Mo. 425; Smith v. Sims, 77 Mo. 269; Lewis v. Welch, 47 Minn. 193, 48 N. W. 608; Barber v. Bowen, 47 Minn. 118, 49 N. W. 684; Price v. Dietrich, 12 Wis. 626; Jameson v. Barber, 56 Wis. 630, 14 N. W. 859; Deck's Estate v. Gherke, 6 Cal. 666; Beckett v. Selover, 7 Cal. 239, 68 Am. Dec. 237; Estate of Schroeder, 46 Cal. 319. Compare Louis v. Triscony, 58 Cal. 304.

matter of an insolvent estate, giving the preference to the individual creditors over the partnership creditors of a deceased partner, is conclusive on the firm creditors, and cannot, in the absence of fraud or other special cause for equitable interposition, be overhauled in chancery.[844] So also the rejection of a claim by the probate court is final and has all the attributes of a judgment.[845] As to the parties concluded by such an order, it is to be observed that the proceeding is strictly inter partes, and therefore will be an estoppel only upon those immediately affected by it. Whether the claim is allowed or rejected, the order is certainly conclusive and binding on the creditor, and will be a bar to any action brought upon it in any other court.[846] And on the principle of mutuality of estoppels, it will be conclusive also on the executor or administrator and on the legatees. But as it is not a proceeding in rem, it is not conclusive on any but parties and privies; so it would not bind heirs, next of kin, or devisees, in respect of the realty,[847] for these, as we have already seen, are not in privity with the personal representatives.[848] Where an allowance of a claim by a probate judge has been procured by fraud, or without notice to the executor, or by mistake, it is liable (although not open to collateral impeachment) to be reversed on appeal, or set aside on motion, or relieved against in equity (the practice varying in the different states), on the application of a proper party.[849] But the rule

[844] Coffin v. McCullough's Adm'r, 30 Ala. 107.

[845] McKinney's Adm'r v. Davis, 6 Mo. 501; Wyatt v. Burr, 25 Ark. 476; Yoes v. Moore, 29 Ark. 121; State v. Ramsey County Probate Ct., 25 Minn. 25; Moerchen v. Stoll, 48 Wis. 307, 4 N. W. 352; Dullard v. Hardy, 47 Mo. 403; State v. Reigart, 1 Gill (Md.) 1, 39 Am. Dec. 628; In re High's Estate, 136 Pa. 222, 20 Atl. 422.

[846] Dooley v. Watkins, 5 Ark. 705; State v. Ramsey County Probate Ct., 25 Minn. 25; Stone v. Wood, 16 Ill. 177; Neill v. Hodge, 5 Tex. 487; Eccles v. Daniels, 16 Tex. 136; McDougald's Adm'r v. Rutherford, 30 Ala. 253.

[847] Beckett v. Selover, 7 Cal. 228, 68 Am. Dec. 237; Stone v. Wood, 16 Ill. 177; Sumrall v. Sumrall, 24 Miss. 258; Marshall v. Rose, 86 Ill. 376. See Burnham v. Burnham, 46 App. Div. 513, 62 N. Y. Supp. 120; Rice v. Ward, 93 Tex. 532, 56 S. W. 747.

[848] Supra, § 560.

[849] Neill v. Hodge, 5 Tex. 487; Bell's Adm'r v. Ayres, 24 Ind. 92; Propst v. Meadows, 13 Ill. 157; Higgins v. Curtis, 82 Ill. 28; Jones v. Brinker, 20 Mo. 88; Lewis v. Williams, 54 Mo. 200; Groner v. Hield, 22 Wis. 200. See Bement v. Ohio Valley Banking & Trust Co., 99 Ky. 109, 35 S. W. 139.

that the allowance of claims by the probate court is tantamount to a judgment applies only to such claims as were debts against the decedent himself, and not to expenses or disbursements of the administrator; the latter are not conclusively settled until final judgment by the probate court upon the settlement of the administrator's accounts after legal notice to the parties interested.[850]

§ 642. Order for Sale of Land.

If regular and legal notice be given to the heirs and all concerned of an application to the probate court for an order for the sale of the decedent's real estate, the order directing such sale is regarded as a judgment of a court of competent jurisdiction, and it legally imports a necessity for such sale, nor can such judgment be collaterally impeached, or the facts on which it is founded be controverted.[851] Much more is this the case when the administrator's application for an order to sell lands for the payment of debts is contested by the heirs or devisees. For it then becomes an adversary suit inter partes, and the decree rendered, whether it grants or refuses the application, is conclusive between the parties in any subsequent suit or contest, as to the matters then in issue and determined, viz., the status of the estate, and the sufficiency of the personal assets for the payment of debts.[852] A judgment of a probate court ordering a re-sale of property sold by an administrator, for failure of the purchaser to pay the purchase-money, is conclusive on the purchaser, and estops him as to all matters which might have been litigated therein.[853] But a decree for the sale of a testator's lands cannot affect the interest of a party in possession, claiming adversely to the testator, and not made a party to the decree, and he cannot be

[850] Deck's Estate v. Gherke, 6 Cal. 666; Gurnee v. Maloney, 38 Cal. 88, 99 Am. Dec. 352; Douglas v. Yost, 28 Abb. N. C. 370, 18 N. Y. Supp. 830.

[851] McDade v. Burch, 7 Ga. 559, 50 Am. Dec. 407; Merrill v. Harris, 26 N. H. 142, 57 Am. Dec. 359; Davie v. McDaniel, 47 Ga. 195; Thomson v. Blanchard, 2 Lea (Tenn.) 528; Doe ex dem. Saltonstall v. Riley, 28 Ala. 164, 65 Am. Dec. 334; Earle v. Earle, 33 S. C. 498, 12 S. E. 164. Compare Snyder's Lessee v. Snyder, 6 Bin. (Pa.) 483, 6 Am. Dec. 493.

[852] Ford v. Ford's Adm'r, 68 Ala. 141; McDonald v. Berry, 90 Ala. 464, 7 South. 838; Anderson v. Anderson, 89 Md. 1, 42 Atl. 207.

[853] Brummagim v. Ambrose, 48 Cal. 366.

removed from such possession until his title is adjudged defective in the regular and established course of judicial proceedings.[854] A decree in chancery confirming an administrator's sale, and declaring that by such sale all the decedent's right, title, and interest in the lands vested in the purchaser, and ordering the heirs to convey, etc., is conclusive of the rights and title of the heirs. And if any objection existed to such administrator's sale, they should have made it at the trial on the bill, and having failed to do so, they are estopped from insisting upon it in another suit concerning the same land.[855]

§ 643. Decree of Distribution.

A decree of distribution made by a probate court after such notice as is prescribed by the statute (or, if the statute does not explicitly require notice, then after such notice as the court in its discretion shall think proper to order), is so far conclusive as to protect an administrator, acting in good faith, in conforming to it.[856] In New Jersey, it is considered that the proceedings for obtaining such a decree are of the nature of proceedings in rem, in which a decision between the parties before the court settles the rights of all parties to the property in question.[857] Perhaps it is not generally necessary to go as far as this, but it is not usually disputed that persons actually taking part in the proceedings will be concluded. Thus,

[854] Tongue v. Morton, 6 Har. & J. (Md.) 21.

[855] Kelly v. Donlin, 70 Ill. 378.

[856] Loring v. Steineman, 1 Metc. (Mass.) 204; Bradshaw's Appeal, 3 Grant. Cas. (Pa.) 109; In re Stillwell's Estate, 139 N. Y. 337, 34 N. E. 777; Brown v. Wheeler, 53 App. Div. 6, 65 N. Y. Supp. 436; Prouty v. Matheson, 107 Iowa, 259, 77 N. W. 1039; Byrne v. Hume, 86 Mich. 546, 49 N. W. 576; Goldtree v. Allison, 119 Cal. 344, 51 Pac. 561; McKenzie v. Budd, 125 Cal. 600. 58 Pac. 199. In Minnesota, a decree of the probate court assigning the residue of an estate is conclusive on all persons interested in the estate, although not then in being. Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. 99. But in Pennsylvania, an order of distribution is not conclusive as to a nonresident infant legatee, who has no notice of the proceeding and is not represented therein, where the auditor is the attorney of the other legatees and devisees, who claim the infant's legacy under a codicil to the will, and is appointed by agreement among them, and on representation that they are all the persons interested in the estate. In re White's Estate, 163 Pa. 388, 30 Atl. 192.

[857] Exton v. Zule, 14 N. J. Eq. 501.

where a judge of probate has, by a decree, allowed a widow her distributive share in her husband's estate, the accuracy of the decree, as to the amount by law allowable to her, cannot be called in question collaterally.[858] So a decree, on a bill in equity filed by the executor of a will against residuary legatees to determine their distributive shares, fixing the amount of an advancement to a legatee and the amount of his share, is conclusive evidence of such amounts in a suit for partition of real estate devised to them by the will.[859] In Wisconsin, however, it is held that the order or judgment of a probate court, distributing and assigning the estate of a decedent, is no bar to a subsequent action to recover from the assignee land so assigned, brought by one who had no notice, actual or constructive, of the application for such order; and the mere giving of the statutory notice of the application for probate of the will is not sufficient to render a judgment of assignment a bar against the heir who was not before the court and had no other notice of the proceeding.[860] A decree making a partial distribution of an estate is conclusive only as to the disposition of the funds then distributed.[861]

§ 644. Settlement of Accounts.

A decree of the probate court settling an executor's or administrator's final account and discharging him from his trust, after due legal notice, and in the absence of fraud, is conclusive upon all matters or items which come directly before the court, until reversed; and it will be presumed that it was founded upon proper evidence, and that every prerequisite to a valid discharge was complied with; nor can the decree be impeached in any collateral proceeding.[862] In

[858] Judge of Probate v. Robins, 5 N. H. 246.

[859] Torrey v. Pond, 102 Mass. 355.

[860] Ruth v. Overbrunner, 40 Wis. 238.

[861] Kline's Appeal, 86 Pa. 363. A decree of a surrogate in relation to the distribution of the personal estate under a will is not conclusive in an action in the supreme court in relation to the disposition of real estate under the same provisions. Corse v. Chapman, 153 N. Y. 466, 47 N. E. 812.

[862] Sparhawk v. Buell's Adm'r, 9 Vt. 41; Jones v. Chase, 55 N. H. 234; Bulkley v. Andrews, 39 Conn. 523; McPherson v. Hamilton, 2 Yeates (Pa.) 40; App v. Dreisbach, 2 Rawle (Pa.) 287, 21 Am. Dec. 447; McFadden v. Geddis, 17 Serg. & R. (Pa.) 336; McLenachan v. Commonwealth, 1 Rawle

New York, it is laid down as the rule, that so long as there is authority on the part of a surrogate to call an administrator to account, and his decree made upon such accounting does not indicate a corrupt intent, or show upon its face that the court has been perverted to accomplish a fraudulent and illegal purpose, and the decree remains unrevoked, it cannot be pronounced fraudulent and void, in a collateral proceeding, however mistaken the surrogate may have been in his view of the facts or the law.[863] The decree, however, is conclusive only as to the matters embraced in the account. It is no bar to the claims of creditors or heirs which did not in any manner form the subject of it.[864] And in some of the states there is strong authority for the rule that one not a party to a settlement of an administrator's account (even though it be a final account) is not bound thereby, but may disregard it and resort to equity to cite the administrator to an account.[865] Thus, where the widow has no notice of the proceedings, other than such constructive notice as arises from the pub-

(Pa.) 357; Burd's Ex'rs v. McGregor's Adm'r, 2 Grant. Cas. (Pa.) 353; Hartzell v. Commonwealth, 42 Pa. 453; Hatcher v. Dillard's Adm'rs, 70 Ala. 343; Slatter v. Glover, 14 Ala. 648, 48 Am. Dec. 118; Shackleford v. Cunningham, 41 Ala. 203; Stubblefield v. McRaven, 5 Smedes & M. (Miss.) 130, 43 Am. Dec. 502; Shoemaker v. Brown, 10 Kan. 383; Ringgold v. Stone, 20 Ark. 526; Holden v. Lathrop, 65 Mich. 562, 32 N. W. 879; Searcy v. Creditors. 46 La. Ann. 376, 14 South. 910; Succession of Allen, 49 La. Ann. 1096, 22 South. 319; Ledoux's Heirs v. Lavedan, 49 La. Ann. 913, 22 South. 214; Lycan v. Miller, 56 Mo. App. 79; Cooper v. Duncan, 58 Mo. App. 5; Young v. Byrd, 124 Mo. 590, 28 S. W. 83, 46 Am. St. Rep. 461. But the judgment of a probate court approving an administrator's accounts is not a bar to a suit against him for an accounting, where, on appeal from such judgment, the accounts have been disapproved and disallowed, except as to commissions allowed him. Appleton v. Marx, 10 C. C. A. 555, 62 Fed. 638. In Canada, the judgment of a court of probate on passing the accounts of executors and trustees is not, so far as the latter are concerned, binding on a court of equity in a suit to remove such trustees. Grant v. Maclaren, 23 Can. Sup. Ct. 310.

[863] People v. Townsend, 37 Barb. 520.

[864] Durham v. Williams, 32 La. Ann. 968; Greenwood v. Warren, 120 Ala. 71, 23 South. 686; Barker v. Laney, 90 Hun, 108, 35 N. Y. Supp. 626.

[865] Clarke v. Perry, 5 Cal. 58, 63 Am. Dec. 82; Belloc v. Rogers, 9 Cal. 129; Van Liew v. Barrett & Barrett Beverage Co., 144 Mo. 509, 46 S. W. 202; Deck v. Gerke, 12 Cal. 433, 73 Am. Dec. 555; Townsend v. Gordon, 19 Cal. 189; Butterfield v. Smith, 101 U. S. 570, 25 L. Ed. 868; Ritchey v. Withers, 72 Mo. 556.

lication of the statutory notice, and is not heard, she is not concluded by the settlement or decree of distribution, as between her and the legatees and distributees.[866] So a legatee is not concluded by the executor's settlement in the probate court, to which he is not a party, in which the executor is credited with the payment of the legacy.[867] Where the court, at the time it fixes the commissions to be allowed to administrators, also determines, upon due notice, the proportions in which they shall be divided, and records its determination on the account, the action of the court amounts to a judgment, and will not be changed except upon a showing of fraud or mistake.[868]

What has been said of the settlements of executors and administrators applies, with proper modifications, to decrees of the probate court upon the settlement of the final accounts of guardians, where that matter is confided to its exclusive jurisdiction. Its judgments in such cases cannot be collaterally questioned, but are conclusive and binding upon the parties until reversed or set aside.[869] Similarly, the decree of a judge of probate, allowing a trustee's account, after proper and reasonable notice to all persons interested, by publication, is conclusive, if not appealed from, in the absence of fraud, as to the amount with which he is chargeable.[870] But an adjudication of the probate court, allowing the account of a trustee, in which the trustee had credited himself with a sum as paid and applied towards the discharge of his debt against the cestui que trust, is extrajudicial and void as against an assignee for value of the income of the cestui que trust, who had merely notice by publication of the probate proceedings, but no personal notice.[871]

[866] Adams v. Adams (N. J.) 17 Atl. 775.

[867] McCullough v. Montgomery, 7 Serg. & R. (Pa.) 17; Sparhawk v. Buell's Adm'r, 9 Vt. 41. See Washbon v. Cope, 144 N. Y. 287, 39 N. E. 388.

[868] Mount v. Slack, 45 N. J. Eq. 129, 17 Atl. 297. See Oakley v. Oakley, 111 Ala. 506, 20 South. 335.

[869] Brodrib v. Brodrib, 56 Cal. 563; Garton v. Botts, 73 Mo. 274; Shackleford v. Cunningham, 41 Ala. 203; Commonwealth v. Gracey, 96 Pa. 70; Smith v. Lewis, 45 La. Ann. 1457, 14 South. 221; Commonwealth v. Patterson, 13 Pa. Super. Ct. 136.

[870] Abbott v. Bradstreet, 3 Allen (Mass.) 587.

[871] Abbott v. Foote, 146 Mass. 333, 15 N. E. 773, 4 Am. St. Rep. 314.

§ 645. Appointment of Guardian.

The action of the proper court in making an appointment of a guardian is also invested with the character of conclusiveness. Thus, in Ohio, plenary and exclusive original jurisdiction is given by law to the probate courts in the matter of appointing guardians, and that jurisdiction attaches in any given case whenever application is duly made for its exercise therein. Such proceedings are not inter partes or adversary in their character, but are properly proceedings in rem, and the order of appointment, made in the exercise of jurisdiction, binds all the world; and, the record showing nothing to the contrary, it will be conclusively presumed, in all collateral proceedings, that such order was made upon full proof of all the facts necessary to authorize it.[872] So in Louisiana, the correctness or regularity of the judgment of a competent court, making the appointment of an under-tutor, cannot be questioned or reviewed collaterally, even by the court which made it.[873]

§ 646. Order for Partition.

In those states where the probate court is invested with jurisdiction to make partition of land between the heirs of an estate, its decree, awarding or confirming a partition, is necessarily as conclusive of the right as a judgment of partition rendered by a court of common law.[874] Thus a decree awarding the property to one of the heirs is conclusive of the title against all parties claiming under the decedent or his heirs.[875] But a proceeding in partition, by which real estate is confirmed to one of the heirs at a valuation, is not conclusive of a question of title to the land confirmed to the heir, as between him and another heir who claimed adversely and disavowed the proceedings.[876] And in general it may be said that a partition by the

[872] Shroyer v. Richmond, 16 Ohio St. 455.

[873] Succession of Keller, 39 La. Ann. 579, 2 South. 553.

[874] Herr v. Herr, 5 Pa. 428, 47 Am. Dec. 416; Burghardt v. Van Deusen, 4 Allen (Mass.) 374; In re Gedney's Estate, 33 Misc. Rep. 160, 68 N. Y. Supp. 627; Burton v. Gagnon, 180 Ill. 345, 54 N. E. 279.

[875] Merklein v. Trapnell, 34 Pa. 42, 75 Am. Dec. 634.

[876] Mehaffy v. Dobbs, 9 Watts (Pa.) 363.

probate court is binding only upon those parties who are before the court or those whom they virtually represent.[877] But the person entitled to the first estate of inheritance may virtually represent those who may claim in remainder or reversion after him; and so the decree may cut off the possible rights of persons not in esse at the time of the partition.[878] The decree is conclusive only as to the lands actually embraced in it.[879] And, in jurisdictions where the probate court has no equity powers, it is not conclusive of equities between the parties.[880]

PART VII. DISTINCTIVE RULES AS TO EJECTMENT AND OTHER REAL ACTIONS.

§ 647. Common Law Rules as to Real Actions.

To the student of the common law, none of its peculiarities appears more striking or significant than the great number and complexity of the forms of action provided for trying the various species of rights and interests in land. As a result of this extremely involved system, the rules for the application of the principle of res judicata to the different varieties of real actions were technical in the highest degree, though not so complicated as might at first appear, since they all rested on one simple fundamental principle. It is to be remembered that, at the common law, actions concerning real property were of various grades and natures, some involving the mere possession, others the right of possession, and others the right of property itself. And it was an established principle that a verdict and judgment in an action of one grade would not operate as a bar to an action of a higher grade. For while the former action would be conclusive of the matters actually determined by it, yet those matters would not include the questions involved in the action of a higher nature. Thus a judgment might be conclusive of the right of possession, and yet no bar to a suit concerning the right of property.[881]

[877] Cryer v. Andrews, 11 Tex. 170.

[878] Wills v. Slade, 6 Ves. 498; Nodine v. Greenfield, 7 Paige (N. Y.) 544, 34 Am. Dec. 363.

[879] Ihmsen v. Ormsby, 32 Pa. 198.

[880] Caperton v. Hall, 83 Ala. 171, 3 South. 234.

[881] Ferrer's Case, 6 Coke, 7; Mattox v. Helm, 5 Litt. (Pa.) 185, 15 Am. Dec.

As was remarked by Lord Ellenborough in a leading case: "A judgment in each species of action is final only for its own proper purpose and object, and no further. The judgment in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trespass committed. In the real action, it affirms a right to the freehold of the land to be in the demandant at the time of the writ brought. Each species of judgment, from one in an action of trespass to one upon a writ of right, is equally conclusive upon its own subject-matter by way of bar to future litigation for the thing thereby decided. Only the matter of the one judgment is, in its nature, and according to its class and degree in the order of actions, more conclusive upon the general right of property in the land than the other." [882] So, on the authority of Roscoe, "in real actions, if a man is barred by judgment in one action, he may bring another of a higher nature and try the same right again. If barred in an assise of novel disseisin, yet, upon showing a descent or other special matter, he may have an assise of mort d'ancestor, a writ of aiel or besaiel, or of entry sur disseisin to his ancestor. So if a man is barred in a formedon in descender, yet he may have a formedon in reverter or in remainder, for that is an action of a higher nature, and in which the fee simple is to be recovered." [883] These distinctions, as will appear from some of the following sections, are not without their practical importance at the present day.

§ 648. Common Recovery.

A judgment in common recovery, notwithstanding the highly fictitious character of the proceeding, was accounted as conclusive, for its own purposes, as in any other form of action. It could not be impeached collaterally except for fraud, or as in other real actions, because the defendant was not a tenant of the freehold.[884]

64; Arnold v. Arnold, 17 Pick. (Mass.) 4; Viner, Abr. "Judgment" Q; Smith v. Sherwood, 4 Conn. 276, 10 Am. Dec. 143.

[882] Outram v. Morewood, 3 East, 346, 357.

[883] Rosc. R. Act. 213.

[884] Ransley v. Stott, 26 Pa. 126; 2 Bl. Comm. 362.

§ 649. Writ of Entry.

At common law, the writ of entry was a merely possessory action, "serving only to regain that possession whereof the demandant or his ancestors have been unjustly deprived by the tenant or possessor of the freehold, or those under whom he claims." It decided nothing with respect to the right of property.[885] This remedy has survived, in a few of our states, in a greatly modified form, in so much that it may now be made the means of trying the title to the land. Thus, in Massachusetts, it is held that judgment for the tenant in a writ of entry is conclusive evidence of the title in a subsequent action of trespass by the demandant against the tenant for breaking and entering the same close. But it is not a bar to such action; because, in the one case, title is in dispute, and in the other, possession; and one may be entitled to the possession, and so able to maintain trespass, though he be not the owner.[886] In the same state it is held that judgment in a writ of entry is not conclusive as to the extent of the land recovered, unless the land is described in the writ or judgment with great certainty.[887]

§ 650. Ejectment at Common Law.

At the common law,—and equally under our own systems, except where the common law has been changed by a statute,—a verdict and judgment in ejectment are not final or conclusive upon the question of title in any other action between the same parties, nor a bar to any number of successive actions of the same kind for the same land.[888] Such actions might be continued indefinitely, unless

[885] 3 Bl. Comm. 180.

[886] Stevens v. Taft, 8 Gray, 419. Compare Batchelder v. Robinson, 6 N. H. 12.

[887] Melvin v. Proprietors of Locks and Canals on Merrimack River, 5 Metc. 15, 38 Am. Dec. 384. A judgment on a writ of entry, putting in issue the legal title only, does not bar a suit to obtain a deed of the property, in which only the equitable title is in issue. Ryder v. Loomis, 161 Mass. 161, 36 N. E. 836.

[888] Atkins v. Horde, 1 Burrows, 114; Doe v. Harlow, 12 Adol. & E. 40; Doe v. Thomas, 1 Tyrw. 410; Miles v. Caldwell, 2 Wall. 35, 17 L. Ed. 755; Rogers v. Haines, 8 Me. 362; Smith v. Sherwood, 4 Conn. 276, 10 Am. Dec.

equity interfered, after a sufficient number of trials had taken place to determine fairly the validity of the title, and by injunction, directed to the unsuccessful litigant, compelled him to cease from harassing his opponent by useless litigation.[889] The reasons for this apparently anomalous rule were well stated by the supreme court of Pennsylvania, in a decision from which we quote as follows: "Originally an ejectment was only an action of trespass by a lessee against one who had ousted him of his term. The plaintiff recovered damages, not possession. The freehold was not in controversy, certainly not directly. It was not until about the reign of Edward IV that courts of law began to give judgment that the plaintiff should recover his term as well as damages. Still it was only a term which he recovered, for the action was always founded on the assertion of an existing lease. Indeed the declaration negatived the ownership of the freehold by the plaintiff. Of course the very structure of the record rendered it impossible to plead a former recovery in bar of a second ejectment. The plaintiff was only a fictitious person, and as the demise might be laid in any number of ways, it never could appear that the second ejectment was for the same thing as the first. Indeed the second ejectment supposed a new demise. For the same reason a verdict and judgment in trespass quare clausum fregit, upon any plea, could not operate as an estoppel in ejectment. Such having been the original nature of the action, any number of successive ejectments could be brought, and the tenant in possession could never protect himself by the

143; Bradford v. Bradford, 5 Conn. 127; Bailey v. Fairplay, 6 Bin. (Pa.) 450, 6 Am. Dec. 486; White v. Kyle's Lessee, 1 Serg. & R. (Pa.) 515; Brown v. Nickle, 6 Pa. 390; Weller v. Dilley, 12 Pa. Co. Ct. R. 84; Eichert v. Schaffer, 161 Pa. 519, 29 Atl. 393; Eldridge v. Hill, 2 Johns. Ch. (N. Y.) 281; Van Blarcom v. Kip, 26 N. J. Law, 351; King v. Townshend, 141 N. Y. 358, 36 N. E. 513; Chapman v. Armistead, 4 Munf. (Va.) 382; Pollard v. Baylors, 6 Munf. (Va.) 433; Mitchell v. Robertson, 15 Ala. 412; Jones v. De Graffenreid, 60 Ala. 145; Camp v. Forrest, 13 Ala. 114; Harper v. Campbell, 102 Ala. 342, 14 South. 650; Sutton v. Pollard, 96 Ky. 640, 29 S. W. 637; Driver v. White (Tenn. Ch. App.) 51 S. W. 994; Kimmel v. Benna, 70 Mo. 52; McKenzie v. Renshaw, 55 Md. 299; Troutman v. Vernon, 1 Bush (Ky.) 482; Hawkins' Lessee v. Hayes, 3 Har. (Del.) 489; Crockett v. Lashbrook, 5 T. B. Mon. (Ky.) 530, 17 Am. Dec. 98; Hinton v. McNeil, 5 Ohio, 209, 24 Am. Dec. 315.

[889] Miles v. Caldwell, 2 Wall. 35, 17 L. Ed. 755. See Ridgeway v. Herbert, 150 Mo. 606, 51 S. W. 1040, 73 Am. St. Rep. 464.

result of a former trial." [890] The case might be different where the judgment in ejectment was offered as evidence in a different kind of action—that is, not another ejectment. It was said at an early day in New York that a judgment in ejectment was of the same binding force and efficacy as any other judgment, except in a second action of ejectment.[891] And the New Jersey court of chancery held that it would look at the questions which were really involved in the ejectment suit, and if the legal question as to the title, which was raised by the bill in equity, was decided by the court of law, and the party had by the judgment and process of the court been put in possession, equity could not require better proof of legal title.[892] So, in another state, "although the judgment in ejectment is not conclusive evidence upon the question of title, it is evidence to some extent, in a subsequent action, where the parties are substantially the same and the same matter is involved in the issue between them. But not being conclusive, it can only be regarded as prima facie evidence, liable to be counterbalanced and controlled by the other testimony in the cause, if it be sufficiently satisfactory to produce that result." [893] But according to the strict common law doctrines, the judgment in ejectment does not appear to have been conclusive, or even admissible, in any other proceeding, save only in the subsidiary action for mesne profits, of which we shall speak presently.

In a great majority of the states, this common law doctrine has been abrogated or changed by the statutes. But in at least one state,—Missouri,—it still remains in full force and vigor. It was there said, quite recently, "that a judgment in ejectment is no bar to a second action for the same property, between the same parties, whether the titles and defenses in both actions be the same or not, has been so long established in this state as to have become a universally recognized rule in the tenure of real property, and will

[890] Stevens v. Hughes, 31 Pa. 381, 384.

[891] Van Wyck v. Seward, 1 Edw. Ch. 327.

[892] Obert v. Obert, 10 N. J. Eq. 98. And see Delaware, L. & W. R. Co. v. Breckenridge (N. J. Err. & App.) 43 Atl. 1097.

[893] Cecil v. Johnson, 11 B. Mon. (Ky.) 35. See, also, Troutman v. Vernon, 1 Bush (Ky.) 482.

not be departed from by this court." [894] And another case declares that this rule "is based on legislation peculiar to this state, and constitutes a rule of property not to be disturbed save by legislative enactment." [895]

§ 651. Ejectment upon an Equitable Title.

In Pennsylvania, an important early case laid down the rule that an action of ejectment brought to compel the specific performance of a contract for the sale of lands (familiarly known in that state as an "equitable ejectment"), is a mere substitute for a bill in equity for the same purpose, and a judgment in such action is equivalent to a decree for specific performance; and since a decree is conclusive between the parties, one judgment in this kind of action is conclusive also; and it was further held that the statute making two concurrent verdicts and judgments in ejectment conclusive upon the title, had no application to actions of ejectment brought to compel the payment of money or the specific performance of a contract of sale, or generally on an equitable title.[896] And this rule has ever since been recognized as settled law in that state.[897] And conversely, where a defendant in ejectment defends on an equitable title, if he has before submitted his title to a court of equity of competent jurisdiction, on a bill praying specific performance of a contract which he claims vested in him the equitable title, and the bill has been dismissed, he cannot afterwards assert it either by way of action or defense.[898] But the rule applies only where the action is to be regarded as a bill in equity and not as a pos-

[894] Avery v. Fitzgerald, 94 Mo. 207, 7 S. W. 6. Earlier cases holding the same rule are Slevin v. Brown, 32 Mo. 176; Holmes v. City of Carondelet, 38 Mo. 551; Foster v. Evans, 51 Mo. 39; Kimmel v. Benna, 70 Mo. 52; Ekey v. Inge, 87 Mo. 493; Hogan v. Smith, 11 Mo. App. 314.

[895] City of St. Louis v. Schulenburg & Boeckler Lumber Co., 98 Mo. 613, 12 S. W. 248. And see Sutton v. Dameron, 100 Mo. 141, 13 S. W. 497; Bailey v. Winn, 101 Mo. 649, 12 S. W. 1045.

[896] Seitzinger v. Ridgway, 9 Watts, 496.

[897] Peterman v. Huling, 31 Pa. 432; Meyers v. Hill, 46 Pa. 9; Taylor v. Abbott, 41 Pa. 352; Amick v. Oyler, 25 Pa. 506; Winpenny v. Winpenny, 92 Pa. 440. See, also, Schive v. Fausold, 137 Pa. 82, 20 Atl. 403; Budd v. Finley, 151 Pa. 540, 25 Atl. 129; Nelson v. Nelson, 117 Pa. 278, 11 Atl. 61.

[898] Sparks v. Walton, 4 Phila. 93.

sessory ejectment at common law.[899] And in order to give the judgment this effect, it must be shown distinctly that the equitable title was directly in issue and decided upon.[900] A similar rule has also been announced in Missouri. It is there held that if, to an ejectment suit, the defendant sets up an equitable defense, and the cause is tried and plaintiff has judgment, such equitable defense is res judicata, and defendant cannot thereafter recover by a proceeding to establish his equitable title so passed on in the former suit.[901]

§ 652. In Action for Mesne Profits.

A recovery in ejectment is conclusive evidence, in a subsequent action of trespass for the mesne profits, as to the plaintiff's right to such profits accruing after the date of the demise laid in the declaration in ejectment.[902] The origin and reasons of this rule have been thus explained: "A recovery in ejectment, while the action was founded on a fiction, did not at first estop the defendant in trespass for the mesne profits, brought in the name of the plaintiff's lessor, from contesting his title to the possession during the time in which the profits had accrued, because the lessor was not a party on the record, and therefore could not have the benefit of an estoppel of it. Neither was he concluded by a judgment against his lessee, who was the legal plaintiff; and therefore it was, and not

[899] Taylor v. Abbott, 41 Pa. 352.

[900] Meyers v. Hill, 46 Pa. 9.

[901] Preston v. Chadwick, 91 Mo. 320, 2 S. W. 793; Chouteau v. Gibson, 76 Mo. 58; Emmel v. Hayes (Mo.) 12 S. W. 521; Clark v. Bettelheim, 144 Mo. 258, 46 S. W. 135.

[902] Aslin v. Parkin, 2 Burr. 668; Chirac v. Reinicker, 11 Wheat. 280, 6 L. Ed. 474; Postens v. Postens, 3 Watts & S. (Pa.) 182, 38 Am. Dec. 752; Drexel v. Man, 2 Pa. 271, 44 Am. Dec. 195; Man v. Drexel, 2 Pa. 202; Kille v. Ege, 82 Pa. 102; Graves v. Joice, 5 Cow. (N. Y.) 261; Lion v. Burtis, 5 Cow. (N. Y.) 468; Van Alen v. Rogers, 1 Johns. Cas. (N. Y.) 281, 1 Am. Dec. 113; Baron v. Abeel, 3 Johns. 481, 3 Am. Dec. 515; Benson v. Matsdorff, 2 Johns. 369; Leland v. Tonsey, 6 Hill (N. Y.) 328; Den d. Bray v. McShane, 13 N. J. Law, 35; Mersbon v. Williams (N. J. Eq.) 31 Atl. 778; Gillum v. Case, 71 Miss. 848, 16 South. 236; Whittington v. Christian, 2 Rand. (Va.) 353; Poston v. Jones, 19 N. C. 295; Brothers v. Hurdle, 32 N. C. 490, 51 Am. Dec. 400; Shumake v. Nelms' Adm'r, 25 Ala. 126; Brewer v. Beckwith, 35 Miss. 467; Crockett v. Lashbrook, 5 T. B. Mon. (Ky.) 531, 17 Am. Dec. 98; Clark v. Boyreau, 14 Cal. 634; Avery v. Superior Court, 57 Cal. 247; 3 Bl. Comm. 205.

for anything peculiar to the nature of an action for land in the abstract, that the loser might renew the contest toties quoties. But as regards the action for mesne profits, it afterward came to be settled by Lord Mansfield, in Aslin v. Parkin, 2 Burr. 667, that the technical effect of the fiction is to be disregarded, and the lessor of the plaintiff treated as the legal party. The consequence was, that though a discomfited defendant might resort to another ejectment for the determination of the title prospectively, he was not at liberty to contest his adversary's title to the mesne profits, which accrued during the period of the demise laid in the previous suit, whether the action for those profits were brought in the claimant's own name, or in that of the fictitious lessee." [903] It makes no difference, in this respect, whether the judgment is rendered upon contestation or not. A judgment by default in an action of ejectment, followed by a writ of possession, is evidence of the right and title of the plaintiff as against the tenant in possession.[904] But it is held, by the English cases, that the judgment in ejectment is not conclusive of the plaintiff's title, though admissible evidence, in trespass for the mesne profits, with a plea of not possessed, unless it is replied by way of estoppel.[905] As to the time covered by the estoppel of the judgment, it is "conclusive of the right of possession, and of the title to the mesne profits from the time of the demise laid in the declaration. That time must always be laid at or subsequent to the period when the plaintiff's right accrued. If laid before, he would fail in the ejectment." [906] But while the record is conclusive evidence that the defendant was in possession at the time the ejectment was brought, and also as to the title during the whole time laid in the demise, it is not evidence of the length of time that the defendant was in possession.[907] And now in England, since the Common Law Procedure Act of 1852, the judgment in ejectment is not conclusive, in a subsequent action for mesne profits, of the plaintiff's title from the day of the demise, but only of his

[903] Postens v. Postens, 3 Watts & S. (Pa.) 182, 38 Am. Dec. 752.
[904] Wilkinson v. Kirby, 15 C. B. 430.
[905] Matthew v. Osborne, 13 C. B. 919.
[906] Van Alen v. Rogers, 1 Johns. Cas. (N. Y.) 281, 1 Am. Dec. 113.
[907] Bailey v. Fairplay, 6 Bin. (Pa.) 450, 6 Am. Dec. 486.

title at the date of the writ.[908] At common law the recovery of mesne profits is not barred by the fact that the plaintiff might and did recover damages in the ejectment. "The damages are nominal, and are not given in satisfaction of the mesne profits, which have long been the subject of a distinct action. They are necessary only to entitle the plaintiff to recover costs, and certainly cannot preclude him from a recovery of the mesne profits any more than the entry of a remittitur upon a judgment by default against the casual ejector. The latter is an express release of the damages upon record, and the former is such by inference only. Both are forms, and do not affect the substantial rights of the parties."[909] But where the statute allows a recovery of mesne profits in an action of ejectment, and prohibits a second action therefor, the plaintiff in ejectment may recover damages for trespasses committed before the judgment, and a recovery in ejectment, omitting such trespasses, will bar a subsequent action for them.[910]

§ 653. Confession of Judgment in Ejectment.

In some of the states it is considered that the fact of a judgment in ejectment being rendered against the defendant upon confession does not alter the rule of the inconclusiveness of adjudications in that species of action.[911] But in Pennsylvania, a confession of judgment in ejectment is conclusive in a subsequent ejectment for the same land between the same parties or their privies. "If he may confess his guilt in a capital case, he may surely confess his want of title in ejectment."[912] A similar effect has been attributed to the defendant's disclaimer of title. This, it is said, admits the plain-

[908] Harris v. Mulkern, 1 Ex. Div. 31.

[909] Van Alen v. Rogers, 1 Johns. Cas. 281, 1 Am. Dec. 113.

[910] Cunningham v. Morris, 19 Ga. 583, 65 Am. Dec. 611. Compare Pacquette v. Pickness, 19 Wis. 219. A judgment for rents and profits against defendant in ejectment is not a bar to an action of trover for the cutting and removal of standing timber from the premises by defendant while in possession. Wilson v. Hoffman, 93 Mich. 72, 52 N. W. 1037, 32 Am. St. Rep. 485.

[911] Botts v. Shields' Heirs, 3 Litt. 32; Hawkins' Lessee v. Hayes, 3 Har. (Del.) 489.

[912] Secrist v. Zimmerman, 55 Pa. 446; Dwyer v. Wright, 14 Pa. Co. Ct. R. 406.

tiff's title to the land, and, nothing further appearing, the plaintiff is entitled to judgment for the land and defendant to judgment for his costs; and in a subsequent action between the plaintiff, or those claiming under him, and the defendant, as to title to the same land, the defendant is estopped by his disclaimer in the former suit, unless he can show that he has since acquired title.[913]

§ 654. Successive Judgments in Ejectment made Conclusive by Statutes.

In some of the American states the legislatures have made an attempt to simplify the trial of title to real estate, and establish a reasonable rule for the finality of adjudications respecting it, but have been partially restrained by a sort of superstitious reverence for land as land, which is no doubt a survival of the common law theories. The result has been the enactment of statutes which provide either (1) that two concurrent verdicts and judgments for the same party in ejectment shall end the litigation and be conclusive of the title, or (2) that two successive judgments for the defendant shall bar a new ejectment upon the same title, or (3) that the defeated party shall be entitled to one new trial as of course,—all of which provisions amount to much the same thing.[914] Some remarks upon these statutes are indispensable to a full consideration of our subject. In Pennsylvania, where the character of finality attaches to "two concurrent verdicts and judgments in favor of the same party," the rule is applied with some strictness. Thus, in an early case, an action of ejectment was brought and verdict and judgment were for the plaintiff; an ejectment was then brought by the former defendant, and he recovered verdict and judgment, but the judgment was reversed by the supreme court; in another ejectment brought by this last party it was held that the verdict and judgment in the first and reversal of judgment in the second were not a bar to the third ejectment.[915] It will be observed that,

[913] Wootters v. Hall, 67 Tex. 513, 3 S. W. 725.

[914] Code Civ. Proc. Colo. § 254; Code Ala. 1886, § 2714; Gen. St. Minn. 1878, c. 75, § 12; Drexel v. Man, 2 Pa. 271, 44 Am. Dec. 195; Williamson v. Mayer, 117 Ala. 253, 23 South. 3.

[915] Mercer v. Watson, 1 Watts, 330.

under this statute, the effect of one judgment in ejectment remains precisely as at common law.[916] Hence, where two ejectments had been brought for parts of the same land, in one of which a verdict and judgment was rendered for the undivided moiety of a certain lot, and in the other for the whole of the tract, the two verdicts and judgments are conclusive as to the moiety only, and are not a bar to a third ejectment between the same parties for the remainder of the land, because such remainder is covered by the estoppel of only one judgment.[917] The Code of Alabama provides that "two judgments in favor of the defendant in an action of ejectment . . . . is a bar to any action for the recovery of the land." This, it is held, does not operate to exclude the record of one judgment for the plaintiff in ejectment as evidence in an action by the defendant to recover for the crops grown on the land; and the judgment cannot be excluded as evidence, under the rule that a prior judgment in ejectment is not admissible in a subsequent suit between the parties, as that rule applies only to a subsequent suit in ejectment.[918] It is provided by statute in Minnesota that the judgment in a second ejectment for the same land "shall be a final determination of the rights of the parties." Upon this statute the supreme court of that state remarks: "It only cuts off the common law right that the defeated party in ejectment had to contest the right of possession as often as he saw fit, until arrested by a decree of the court of chancery. The statute limits this right to two trials, and declares the second judgment final,—that is, final so far as to bar another action for the same cause; but like all other final judgments it may be reviewed for errors committed on the trial." [919] This statute does not apply to an action to set aside a conveyance of real estate on the ground of fraud.[920] Finally, where the effect of a judgment, or of successive judgments, in ejectment is regulated by a state statute, such enactment establishes a rule of property in lands within the state, and is binding on the

[916] Drexel v. Man, 2 Pa. 271, 44 Am. Dec. 195.
[917] Kinter v. Jenks, 43 Pa. 445.
[918] Carlisle v. Killebrew, 89 Ala. 329, 6 South. 756, 6 L. R. A. 617.
[919] Faze v. Arper, 6 Minn. 220, 233 (Gil. 142).
[920] Somerville v. Donaldson, 26 Minn. 75, 1 N. W. 808.

federal courts sitting within the state.[921] And conversely, the courts of Pennsylvania, under the statute already noticed, consider themselves bound by two concurrent verdicts and judgments of the federal court in ejectment between the same parties.[922]

§ 655. Modern Actions Corresponding to Ejectment.

In many of the states, statutes have been enacted which free the action of ejectment from the fictions and artificialities which formerly surrounded it, and make it in reality a plain and simple remedy for the recovery of real property, prescribing also, either expressly or by necessary inference, that the judgment shall have the same conclusive effect as in any other species of suit. In other states, the adoption of a code of practice has abolished all forms of action, and the modern innominate action for the recovery of realty resembles the old suit in ejectment only in respect to its object. The action being brought by and against the real claimants, and all other fictions being abolished, it correlates in all respects with the purely personal actions, and, as a necessary consequence, the judgment has the character of finality. It follows that in all these states the judgment is conclusive of the points and questions actually litigated and determined,—that is, the titles put in issue and tried, and the right of possession,—and will bar any subsequent action between the same parties or their privies for the same land. The decisions show that this is now the settled rule in the states of Vermont,[923] New York,[924] North Carolina,[925] Georgia,[926] Mississippi,[927] Ar-

[921] Britton v. Thornton, 112 U. S. 526, 5 Sup. Ct. 291, 28 L. Ed. 816; Equator Mining & Smelting Co. v. Hall, 106 U. S. 86, 1 Sup. Ct. 128, 27 L. Ed. 114; Miles v. Caldwell, 2 Wall. 35, 17 L. Ed. 755.

[922] Strayer v. Johnson, 110 Pa. 21, 1 Atl. 222.

[923] Parks v. Moore, 13 Vt. 183, 37 Am. Dec. 589; Edwards v. Roys, 18 Vt. 473; Hunt v. Payne, 29 Vt. 172, 70 Am. Dec. 402; Hodges v. Eddy, 52 Vt. 434; Marvin v. Dennison, 1 Blatchf. 159, Fed. Cas. No. 9,180.

[924] Code Civ. Proc. N. Y. § 1524; King v. Townshend, 65 Hun, 567, 20 N. Y. Supp. 602; Dawley v. Brown, 79 N. Y. 390; Sheridan v. Andrews, 3 Lans. 129; Castle v. Noyes, 14 N. Y. 329; Kelsey v. Ward, 38 N. Y. 88; Campbell v. Hall, 16 N. Y. 575.

[925] Johnson v. Pate, 90 N. C. 334; Benton v. Benton, 95 N. C. 559. See Jordan v. Farthing, 117 N. C. 181, 23 S. E. 244.

[926] Sims v. Smith, 19 Ga. 124; Dickerson v. Powell, 21 Ga. 143; McCurry

[927] See note 927 on following page.

kansas,[928] Kentucky,[929] Illinois,[930] Iowa,[931] California,[932] Oregon,[933] Nevada,[934] Indiana,[935] Kansas,[936] Colorado,[937] Tennessee,[938] Connecticut,[939] and probably in some others not here enumerated.[940]

The modern rule is therefore correctly stated in the following language by the supreme court of Illinois: "A judgment at law, whether in an ejectment suit or in some other form of action, is conclusive on the parties upon all questions, titles, and rights involved in the litigation and passed upon by the court, which the court had power

v. Robinson, 23 Ga. 321; Glover v. Stamps, 73 Ga. 209, 54 Am. Rep. 870 (unless the jury find for the plaintiff less than the fee, Parker v. Stambaugh, 71 Ga. 735; Lamar v. Knott, 74 Ga. 379; Craig v. Watson, 68 Ga. 114).

[927] Mering v. Ables, 62 Miss. 271, 52 Am. Rep. 186; Gaines v. Kennedy, 53 Miss. 103.

[928] Sturdy v. Jackaway, 4 Wall. 174, 18 L. Ed. 387. But see Dawson v. Parham, 55 Ark. 286, 18 S. W. 48.

[929] Troutman v. Vernon, 1 Bush, 482.

[930] Barger v. Hobbs, 67 Ill. 592; Regan v. West, 115 Ill. 603, 4 N. E. 365; Hawley v. Simons, 102 Ill. 118; Oetgen v. Ross, 54 Ill. 79; Gage v. Eddy, 186 Ill. 432, 57 N. E. 1030. But, by statute in this state, the party against whom the verdict in ejectment is rendered is entitled, on payment of costs, to have the judgment vacated, and a new trial granted; and when this is done, the judgment in the original action becomes wholly inoperative, and the doctrine of res judicata does not apply. Hammond v. Carter, 161 Ill. 621, 44 N. E. 274.

[931] Sobey v. Beller, 28 Iowa, 323.

[932] Marshall v. Shafter, 32 Cal. 176; Amesti v. Castro, 49 Cal. 325; Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187; Phelan v. Tyler, 64 Cal. 80, 28 Pac. 114; Graves v. Hebbron, 125 Cal. 400, 58 Pac. 12.

[933] Code Civ. Proc. § 329; Hill v. Cooper, 8 Or. 254; Collins v. Goldsmith (C. C.) 71 Fed. 580. See Spaur v. McBee, 19 Or. 76, 23 Pac. 818.

[934] Sherman v. Dilley, 3 Nev. 21.

[935] Millikan v. Werts, 14 Ind. App. 223, 42 N. E. 820; Jarboe v. Severin, 112 Ind. 572, 14 N. E. 490. But in this state, as in Illinois, the unsuccessful party in an action of ejectment may have the judgment vacated and a new trial granted. See Stafford v. Cronkhite, 114 Ind. 220, 16 N. E. 596.

[936] Hentig v. Redden, 46 Kan. 231, 26 Pac. 701, 26 Am. St. Rep. 91; Peterson v. Albach, 51 Kan. 150, 32 Pac. 917. See Neuber v. Shoel, 8 Kan. App. 345, 55 Pac. 350.

[937] New Dunderberg Min. Co. v. Old, 38 C. C. A. 89, 97 Fed. 150.

[938] Shannon's Code, § 5000; Gordon v. Weaver, 53 S. W. 740.

[939] Kashman v. Parsons, 70 Conn. 295, 39 Atl. 179.

[940] See Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355.

and jurisdiction to hear and determine, and nothing more; and whenever the same questions or the same rights or titles are again drawn in issue, whether in a court of equity or court of law, between the same parties or their privies, the previous adjudication must be regarded as conclusive upon them, and they will not be permitted to open up the controversy again." [941] But the judgment is conclusive only as to the title litigated and established in the action; it is not the recovery which constitutes an estoppel in a subsequent action, but the decision of the question which was in contestation between the parties.[942] The fact that, by reason of lapse of time, a judgment for the recovery of real property can no longer be enforced by execution, will not affect its force as an estoppel against the unsuccessful party.[943]

§ 656. After-Acquired Title not Barred.

A judgment in ejectment is not conclusive except as against defenses actually made, or legal defenses which might have been made on the trial. It does not deprive a party of the right to acquire a new and distinct title, and, having done so, to assert it without prejudice from the former suit.[944] Thus a judgment recovered against a demandant who has an equitable title only, will not estop him if he afterwards acquires the legal title.[945] "There can be no doubt that a judgment rendered in an action to recover the possession of real property, under the system of pleading and practice adopted in this state, is, as to all matters put in issue and passed on in the action, conclusive between the parties and their privies, and a bar, in another action between the parties or their privies, when the same matters are directly in issue. The bar of a judgment in such an action is,

[941] Hawley v. Simons, 102 Ill. 115. And see Sturdy v. Jackaway, 4 Wall. 174, 18 L. Ed. 387.

[942] Dawley v. Brown, 79 N. Y. 390.

[943] Bazille v. Murray, 40 Minn. 48, 41 N. W. 238.

[944] Barrows v. Kindred, 4 Wall. 399, 18 L. Ed. 383; Northern Pac. R. Co. v. Smith, 16 C. C. A. 336, 69 Fed. 579; Hawley v. Simons, 102 Ill. 115; Burns v. Hodgdon, 64 Cal. 72, 28 Pac. 61; People's Sav. Bank v. Hodgdon, 64 Cal. 95, 27 Pac. 938; Woodbridge v. Banning, 14 Ohio St. 328; Mann v. Rogers, 35 Cal. 316; Mahoney v. Van Winkle, 33 Cal. 448; Emerson v. Sansome, 41 Cal. 552; McLane v. Bovee, 35 Wis. 27.

[945] Brown v. Roberts, 24 N. H. 131.

however, limited to the rights of the parties as they existed at the time when it was rendered; and neither the parties nor their privies are precluded by the same from showing, in a subsequent action, any new matters occurring after its rendition which give the defeated party a title or right of possession." [946]

§ 657. Judgment in Trespass.

As in every form of personal action, a judgment in trespass is conclusive of the points actually litigated and determined. If issue is joined upon the particular question of a right of entry in the land at the time of the alleged trespass, the judgment will prove the same point in a subsequent action of trespass between the same parties concerning the same land.[947] But "a judgment for the defendant in an action of trespass quare clausum does not necessarily settle anything beyond the particular facts of the trespass sued for. It may be rendered upon failure of the plaintiff to prove the acts alleged, or upon his failure to prove his right of possession. Either would be sufficient to sustain the judgment for the defendant. If the proofs should make it appear that the issue by which the case had been determined was upon the right of possession, still the judgment would only determine the right of possession at the time of the commission of the trespass set forth in that case. It is not conclusive upon the title, because the right of possession only, and not the title, is involved in an action of trespass." [948] Thus, in an action for obstructing a way claimed by the plaintiff as appurtenant to his land, a verdict and judgment on the general issue pleaded do not conclude the parties in regard to the title; [949] although such judgment may be admissible (not conclusive) evidence to show that the plaintiff has a right to the

[946] Thrift v. Delaney, 69 Cal. 188, 10 Pac. 475.

[947] Pleak v. Chambers, 7 B. Mon. (Ky.) 565.

[948] Morse v. Marshall, 97 Mass. 519; Morrison v. Clark, 89 Me. 103, 35 Atl. 1034, 56 Am. St. Rep. 395; Hunter v. Carroll, 67 N. H. 262, 29 Atl. 639; Holloway v. Jones, 143 Pa. 564, 22 Atl. 710; Rice v. West (Ky.) 42 S. W. 116; Cherry v. York (Tenn.) 47 S. W. 184; Millett v. Lagomarsino (Cal.) 38 Pac. 308; Keyser v. Sutherland, 59 Mich. 455, 26 N. W. 865; Masten v. Olcott, 101 N. Y. 152, 4 N. E. 274.

[949] Standish v. Parker, 2 Pick. (Mass.) 20, 13 Am. Dec. 393.

way.[950] And since, in trespass or case for an injury to land, although the plaintiff may allege a title in fee, he is only bound to prove a possession, a judgment in his favor, or a plea of the general issue, will be conclusive evidence only of such possession.[951]

But the trial of an action of trespass may turn upon the question of title, and if either of the parties puts his title in issue and it is tried and passed upon, the verdict and judgment in that suit will be conclusive evidence in favor of (or against) such title, at least in a subsequent action of trespass.[952] Thus judgment for the plaintiff, when put in evidence in a subsequent action against the same defend-

[950] Parker v. Standish, 3 Pick. (Mass.) 288.

[951] Parker v. Hotchkiss, 25 Conn. 321.

[952] Outram v. Morewood, 3 East, 346; Parker v. Leggett, 13 Rich. Law (S. C.) 171; Burt v. Sternburgh, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402; Small v. Haskins, 26 Vt. 209; Dunckle v. Wiles, 5 Denio (N. Y.) 296; Illinois & St. L. R. & Coal Co. v. Cobb, 82 Ill. 183; Campbell v. Cross, 39 Ind. 155; City of Providence v. Adams, 11 R. I. 190; Fritz v. Tompkins, 39 App. Div. 73, 56 N. Y. Supp. 847; Rhoads v. City of Metropolis, 36 Ill. App. 123. In Stevens v. Hughes, 31 Pa. 381, 385, it was said: "The inconclusiveness of a verdict and judgment in ejectment is due to the form of the action, not to the character of the subject-matter of the controversy. The apparent exception nowhere else exists. That there is no charm about land as land which relieves it from the operation of the general rule that a judgment between the same parties or their privies, directly upon the same matter, is the end of controversy,—that it is an estoppel against future litigation of the same question,—is evident from the fact that a fine, a common recovery, a simple judgment in a writ of right, and indeed judgments in any real action, have always been held to be conclusive. Whatever, therefore, may be the rule in regard to ejectments, there is neither reason nor authority for the position that a judgment upon a traverse of a plea of liberum tenementum in trespass does not estop a party to it, or his privy, from again asserting or denying the same freehold in a subsequent action of trespass." So again, in White v. Chase, 128 Mass. 158, Morton, J., observed: "It is true that an action of tort in the nature of trespass quare clausum fregit does not necessarily involve anything more than the right of possession, that the title or seisin may not be in issue, and that the judgment in such action is conclusive only upon the matter adjudged, which is the right of possession. Johnson v. Morse, 11 Allen, 540; Morse v. Marshall, 97 Mass. 519. But the trial of an action of trespass may turn upon the question of title, and if that question is put in issue, tried, and passed upon by the jury or court or a referee, the verdict or finding, and the judgment following it, are competent evidence of that fact in a subsequent writ of entry between the same parties, even if it does not operate as a conclusive estoppel. Eastman v. Cooper, 15 Pick. 276, 26 Am. Dec. 600; Dutton v. Woodman, 9 Cush.

ant for trespass upon the same premises, is conclusive evidence of the plaintiff's title, where such title was drawn in question and litigated in the former suit; but the defendant may show that he has acquired title since the former action, or that the plaintiff's title has terminated.[953] So where the defendant pleads soil and freehold, setting forth his claim by metes and bounds, and there is a verdict upon that plea in his favor, the record is conclusive evidence of his title in a subsequent action of trespass to try title brought by him against the plaintiff for the land included in the plea.[954] According to the doctrine of a majority of the cases, it is necessary, in order to make a judgment in trespass conclusive of the title, that the title should have been expressly put in issue by plea of liberum tenementum or some other equivalent plea; it is not sufficient that it came in controversy under the general issue.[955] As stated in a Massachusetts decision, "an action of tort in the nature of trespass does not bind the title as between the parties, unless it appears by special plea or particular specification of defense, or in some other mode, that the particular fact which is claimed to be settled was adjudicated upon by the tribunal to which it was presented." [956] But there is also authority for the proposition that it is alone necessary that the title should have been actually and fully litigated and passed upon, and that, in that case, the judgment will be conclusive upon that question, although it may have arisen upon the general issue and not under a special plea.[957] And this rule seems to us to be more in harmony with the best accepted doctrines in regard to the identification of the "matter in issue" and the scope of the estoppel.[958]

255, 57 Am. Dec. 46; Sawyer v. Woodbury, 7 Gray, 499, 66 Am. Dec. 518; Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733."

[953] Burt v. Sternburgh, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402.

[954] Parker v. Leggett, 13 Rich. Law (S. C.) 171. Compare Kimball v. Hilton, 92 Me. 214, 42 Atl. 394.

[955] Potter v. Baker, 19 N. H. 166; Standish v. Parker, 2 Pick. (Mass.) 20, 13 Am. Dec. 393; Parker v. Hotchkiss, 25 Conn. 321; Stevens v. Hughes, 31 Pa. 381; Dunckle v. Wiles, 5 Denio (N. Y.) 296. See, also, Rogers v. Ratcliff, 48 N. C. 225; Walker v. Leslie, 90 Ky. 642, 14 S. W. 682; Young v. Pritchard, 75 Me. 513.

[956] Stapleton v. Dee, 132 Mass. 279.

[957] Shettlesworth v. Hughey, 9 Rich. Law (S. C.) 387. And see Rhoads v. City of Metropolis, 144 Ill. 580, 33 N. E. 1092, 36 Am. St. Rep. 468.

[958] See supra, § 614.

§ 658. Whether Judgment in Trespass is Conclusive in Subsequent Ejectment.

In the preceding section we considered the effect of a judgment in trespass when offered as a bar or estoppel in another action of trespass. But whether the judgment in trespass, title having been drawn in question and determined, will be conclusive in a subsequent ejectment or other action for the recovery of the land itself is a controverted point. It is held in the affirmative in some few states.[959] But it is denied in Pennsylvania;[960] although it is thought, in that state, that the judgment in trespass might be admissible as "persuasive" evidence in favor of the successful party.[961] But if conclusive at all, it is conclusive only upon the title litigated. Thus where, to an action of trespass, the defendant pleaded the general issue and lib. ten., which were found for the plaintiff, it was held that in an ejectment brought by the same plaintiff against the same defendant, for the same land, the former finding did not estop the defendant from denying the plaintiff's title, for that title was not put in issue by the pleadings, but only the defendant's title.[962] In Massachusetts it is held that where the trial of an action of trespass turns upon the question of title, and the title is put in issue and passed upon, the verdict and judgment in that action are competent evidence of that fact in a subsequent writ of entry between the same parties, though not conclusive by way of estoppel.[963] In Michigan, principally for reasons drawn from the statute law of that state, the courts refuse to give a conclusive effect to a judgment in trespass when offered in a subsequent ejectment.[964]

[959] Campbell v. Cross, 39 Ind. 155; Hargus v. Goodman, 12 Ind. 629; Rice v. King, 7 Johns. (N. Y.) 20; McKnight v. Dunlop, 4 Barb. (N. Y.) 36; Parker v. Leggett, 13 Rich. Law (S. C.) 171.

[960] Kerr v. Chess, 7 Watts, 367; Sabins v. McGhee, 36 Pa. 453.

[961] Hoey v. Furman, 1 Pa. 295, 44 Am. Dec. 129.

[962] Stokes v. Fraley, 50 N. C. 377.

[963] White v. Chase, 128 Mass. 158; Eastman v. Cooper, 15 Pick. 276, 26 Am. Dec. 600; Sawyer v. Woodbury, 7 Gray, 499, 66 Am. Dec. 518. See Arnold v. Arnold, 17 Pick. 4; Johnson v. Morse, 11 Allen, 540.

[964] Keyser v. Sutherland, 59 Mich. 455, 26 N. W. 865.

§ 659. Trespass to Try Titles.

The action of trespass to try titles is a remedy provided by statute in a number of the states for the recovery of realty. Its object being to provide a convenient and efficacious method for the settlement of disputed questions of title, it is generally provided that the result shall be final and conclusive on the losing party.[965] But this is not always the case, especially where this action is merely given as an allowable substitute for ejectment, and, under the laws of the particular state, a judgment in ejectment is not conclusive.[966] It does not bar an after-acquired title. Where there is a recovery against the defendant in an action of trespass to try title, and he subsequently acquires title by taking out a grant and re-enters, the recovery in the first is not an estoppel in a second action for the same land.[967] Further, the judgment in this action is res judicata only as to the land in issue, though plaintiff's claim thereto is based on his claim to a larger tract including it.[968] Where the record shows a judgment in favor of the plaintiff because the defendant in possession was plaintiff's tenant, and therefore estopped to deny his title, such judgment is no bar to a subsequent action by the other defendants against said plaintiff to recover the same land.[969] And where the action is trespass to try title and for partition, and the defendant does not dispute the title, but defends only against the trespass and partition, a judgment in his favor does not bar the plaintiff from again asserting title, because it shows on its face that the title was not adjudicated.[970]

[965] Fisk v. Miller, 20 Tex. 579; Cotton v. Jones (Tex. Civ. App.) 27 S. W. 191; Rackley v. Fowlkes, 89 Tex. 613, 36 S. W. 77; New York & T. Land Co. v. Votaw, 16 Tex. Civ. App. 585, 42 S. W. 138; Zapeda v. Rahm, 19 Tex. Civ. App. 648, 48 S. W. 212; Birdseye v. Shaeffer (Tex. Civ. App.) 57 S. W. 987; Dyson v. Leek, 5 Strob. (S. C.) 141.

[966] Mitchell v. Robertson, 15 Ala. 412; Camp v. Forrest, 13 Ala. 114.

[967] Bank of State v. Bridges, 11 Rich. Law (S. C.) 87.

[968] Hanrick v. Gurley, 93 Tex. 458, 54 S. W. 347.

[969] Linberg v. Finks, 7 Tex. Civ. App. 391, 25 S. W. 789.

[970] Brown v. Reed, 20 Tex. Civ. App. 74, 48 S. W. 537.

§ 660. Judgment in Partition.

At the common law, partition was regarded as a mere possessory action, not involving the title to the property, but only determining upon the possession. And therefore it could at most bar an action of equal grade, that is, a possessory action; but it could not stand in the way of a subsequent action of a higher grade or dignity, e. g., a writ of right.[971] But nevertheless the action of partition forms no exception to the general rule that a judgment is conclusive of every matter which is actually and necessarily involved in its determination. And hence, if the title of the property comes in issue, it is bound by the judgment.[972] And now, in most of the American states, partition has ceased to be regarded as a mere possessory action, and has come to involve the right of property as well as the possession; and in such cases the judgment is conclusive upon every right or title which either of the parties presented, or might have put in issue, in the litigation.[973] "Title to real estate may be put in issue, tried, and determined in partition proceedings, and when so put in issue, tried, and determined, the judgment rendered is binding upon all the parties to the issue."[974] The rule in New York is, that a judgment in an

[971] Mallett v. Foxcroft, 1 Story, 474, Fed. Cas. No. 8,989; Pierce v. Oliver, 13 Mass. 211; Nash v. Cutler, 16 Pick. (Mass.) 500; Goundie v. Northampton Water Co., 7 Pa. 238; McClure v. McClure, 14 Pa. 136; Richman v. Baldwin, 21 N. J. Law, 398; Nicely v. Boyles, 4 Humph. (Tenn.) 177, 40 Am. Dec. 638; Whillock v. Hale's Heirs, 10 Humph. (Tenn.) 64; Freem. Coten. § 529.

[972] Foxcroft v. Barnes, 29 Me. 128; Burghardt v. Van Deusen, 4 Allen (Mass.) 375; Herr v. Herr, 5 Pa. 428, 47 Am. Dec. 416; Ihmsen v. Ormsby, 32 Pa. 200; Dixson v. Warters, 53 N. C. 449; Rabb v. Aiken, 2 McCord, Eq. (S. C.) 125; Ferris v. Fisher, 67 Hun, 134, 21 N. Y. Supp. 1114; McAlexander v. Coopwood (Miss.) 25 South. 488; Rice v. Aiken, 3 Tex. Civ. App. 143, 22 S. W. 101; Stephenson v. Boody, 139 Ind. 60, 38 N. E. 331; Pennell v. Felch, 55 Kan. 78, 39 Pac. 1023.

[973] Whittemore v. Shaw, 8 N. H. 393; Clapp v. Bromagham, 9 Cow. (N. Y.) 569; Jenkins v. Fahey, 73 N. Y. 355; Short v. Prettyman, 1 Houst. (Del.) 334; Stean v. Anderson, 4 Har. (Del.) 209; Mills v. Witherington, 19 N. C. 433; Edgerton v. Muse, Dud. Eq. (S C.) 179; Reese v. Holmes, 5 Rich. Eq. (S. C.) 540; Dabney v. Manning, 3 Ohio, 321, 17 Am. Dec. 597; Doolittle v. Don Maus, 34 Ill. 457; Telford v. Barney, 1 G. Greene (Iowa) 575; Forder v. Davis, 38 Mo. 107; Pentz v. Kuester, 41 Mo. 450; Hart v. Steedman, 98

[974] Fleenor v. Driskill, 97 Ind. 27.

action for partition is binding and conclusive upon all the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and had decided, as incident to or essentially connected with the subject-matter of the litigation within the purview of the action, either as matter of claim or defense.[975] On these principles, where the plaintiff in an ejectment suit claims premises which had been set off to the party under whom the defendant claims by a judgment rendered in a suit for partition to which the plaintiff was a party, the latter is estopped from setting up title against the judgment.[976] The judgment therefore establishes the title of the parties to the land partitioned, and is conclusive as to any adverse claim of title or of possession on their part existing at the time of its rendition.[977] It is conclusive evidence upon the parties and their privies that the land set off to the petitioner, together with a spring of water situated thereon, was formerly held by the parties in common.[978] But while the judgment in partition is conclusive as to the title under which the parties hold in common, it does not invest them with any new title, nor have the effect of changing their title, its only legal effect being to sever the unity of possession.[979] Hence a judgment in partition, assigning a share of the land to one for life, who is really seised of the share in fee simple, gives the share in fee, having the effect merely to part the land, without otherwise affecting the title, unless an issue had been made and directly decided as to the title.[980] In some few states, the rules hitherto stated do not apply, or are accepted only with con-

Mo. 452, 11 S. W. 993; Hancock v. Lopez, 53 Cal. 362; Morenhout v. Higuera, 32 Cal. 295; Linehan v. Hathaway, 54 Cal. 251. And see Weeks v. Edwards, 176 Mass. 453, 57 N. E. 701; Pierson v. Conley, 95 Mich. 619, 55 N. W. 387; Christy v. Spring Valley Waterworks, 97 Cal. 21, 31 Pac. 1110.

[975] Jordan v. Van Epps, 85 N. Y. 427.

[976] Doolittle v. Don Maus, 34 Ill. 457.

[977] Bobb v. Graham, 89 Mo. 200, 1 S. W. 90; Choppin v. Union Nat. Bank, 47 La. Ann. 660, 17 South. 201; Beaver v. Irwin, 6 Ind. App. 285, 33 N. E. 462; Pearce v. Jackson, 84 Tex. 515, 19 S. W. 690; Moy v. Moy, 111 Iowa, 161, 82 N. W. 481; Phillips v. Winter (Cal.) 37 Pac. 154.

[978] Edson v. Munsell, 12 Allen (Mass.) 600.

[979] Christy v. Spring Valley Waterworks, 68 Cal. 73, 8 Pac. 849; Fleenor v. Driskill, 97 Ind. 27.

[980] Kenney v. Phillipy, 91 Ind. 511.

siderable modifications. Thus, in Pennsylvania, "it is settled that partition operates merely on the lines of division, leaving the title unaffected. Where, therefore, partition is not followed by actual occupancy of the purpart, or the verdict is adverse to the demandant, there is nothing to bar a subsequent ejectment to try a disputed title." [981] So in Texas, a decree of partition of the land of a testator, and confirmation of the commissioner's report, made by a probate court, do not estop a devisee, who is a party to the proceedings, to set up a claim to the land otherwise derived, as the probate court has no authority to determine title to land.[982] A petitioner for partition will be barred or estopped by a judgment on a former petition, if the parties and the title put in issue or necessarily decided are the same; but where the former petition was of part only of the land held in common, and all the co-tenants were not made parties to the suit, the judgment will not be a bar or estoppel to a subsequent petition for partition of the whole land held in common and to which all the co-tenants are made parties.[983]

§ 661. Parties Bound by Partition.

A judgment in partition is conclusive upon all persons having any interest, contingent or otherwise, who are made parties, and conveyances upon sale under the judgment are a bar in law and equity as against all such parties or their representatives.[984] And when proceedings in partition are properly taken to bind "unknown owners," the judgment not only concludes such persons in respect to any interest they may have as tenants in common, but precludes them afterwards from showing that they had a paramount title in severalty to any part of the partitioned premises.[985] And where such proceed-

[981] Ross v. Pleasants, 19 Pa. 168.

[982] Mayo v. Tudor's Heirs, 74 Tex. 471, 12 S. W. 117.

[983] Colton v. Smith, 11 Pick. (Mass.) 311, 22 Am. Dec. 375.

[984] Jenkins v. Fahey, 73 N. Y. 355. But a decree of partition is not res judicata on the question of title as against claimants or other persons who were strangers to the partition suit. Pacific Bank v. Hannah, 32 C. C. A. 522, 90 Fed. 72; Gunn v. Ohio River R. Co., 42 W. Va. 676, 26 S. E. 546, 36 L. R. A. 575.

[985] Kane v. Rock River Canal Co., 15 Wis. 179, citing Kester v. Stark, 19 Ill. 328; Foxcroft v. Barnes, 29 Me. 128; Rogers v. Tucker, 7 Ohio St.

ings are regularly prosecuted, and there is no showing of any fraud or collusion, a person who was cited only in the class of "unknown owners" is concluded, although in reality, at the time, he was in possession claiming in severalty; because, by his silence, he admits the tenancy in common and the right of the petitioners to have partition.[986] According to the English rule, the possible or contingent interests of reversioners or remaindermen (including persons not in esse) may be cut off by a decree in partition, if they were virtually represented by the presence on the record of the person entitled to the first estate of inheritance.[987] In New York, this can be done only when the judgment provides for and protects such interests, by substituting the fund derived from the sale of the land in place of it, and preserving the fund to the extent necessary to satisfy such interests.[988]

§ 661a. Landlord's Action for Recovery of Possession.

In several of the states, statutes authorize summary proceedings by a landlord to evict a tenant for non-payment of rent and to recover possession of the leased premises, of which the so-called "dispossess proceedings" familiar in practice in the state of New York may serve as a type. Judgment rendered in such an action is conclusive, as between the parties, in all subsequent proceedings, of the relation of landlord and tenant, including questions as to the existence and validity of the lease, its alleged cancellation or renewal, the amount of rent in arrear, and the landlord's right to regain possession.[989] Thus, the tenant cannot afterwards set up an oral agree-

417; Pfeltz v. Pfeltz, 1 Md. Ch. 455; Reese v. Holmes, 5 Rich. Eq. (S. C.) 540; Blakeley v. Calder, 15 N. Y. 617; Mead v. Mitchell, 17 N. Y. 210, 72 Am. Dec. 455; Croghan v. Livingston, 17 N. Y. 218.

[986] Cook v. Allen, 2 Mass. 461.

[987] Wills v. Slade, 6 Ves. 498; Gaskell v. Gaskell, 6 Sim. 643. See Goodess v. Williams, 2 Younge & C. 595.

[988] Monarque v. Monarque, 80 N. Y. 320. See, also, Nodine v. Greenfield, 7 Paige, 544; Mead v. Mitchell, 17 N. Y. 210, 72 Am. Dec. 455; Cheeseman v. Thorne, 1 Edw. Ch. 629; Tyler v. Cartwright, 40 Mo. App. 378.

[989] Reich v. Cochran, 151 N. Y. 122, 45 N. E. 367, 37 L. R. A. 805, 56 Am. St. Rep. 607; Nemetty v. Naylor, 100 N. Y. 562, 3 N. E. 497; McCotter v. Flynn, 30 Misc. Rep. 119, 61 N. Y. Supp. 786; Grafton v. Brigham, 70 Hun, 131, 24 N. Y. Supp. 54; Racke v. Anheuser-Busch Brewing Ass'n, 17 Tex.

ment under which he would have been entitled to retain possession, and especially when such oral agreement is inconsistent with the terms of the written lease.[990] But summary proceedings for the possession of demised property being against the person in possession or claiming possession, a landlord is not necessarily precluded by such proceeding from showing a different person to have been in fact his lessee, or liable to him under an agreement creating a tenancy.[991] And it is said that, in an action on notes given for rent, a finding that previous summary proceedings brought by the lessor against the lessee, and the judgment therein, were for the recovery of possession of the property and damages for the detention thereof, will not support a conclusion that the notes were merged in such judgment.[992]

§ 662. Action for Use and Occupation.

The action for "use and occupation" is a species of assumpsit, which lies when one has used another's realty under a contract, express or implied, to pay therefor, and for the value of which an action for rent cannot be maintained, as for want of a lease, or of an agreement to pay a specified sum.[993] A judgment recovered by the plaintiff in this action is admissible in evidence against the defendant, on the trial of a writ of entry brought against him by the plaintiff in the former action to recover possession of the same real estate, though probably not conclusive.[994]

§ 663. Forcible Entry and Detainer.

A judgment in an action of forcible entry and detainer cannot be pleaded as a bar to an action of ejectment, or of trespass, or a suit to quiet title, or to enforce a foreclosure, for the reason that the questions involved in the two proceedings are different. "The ob-

Civ. App. 167, 42 S. W. 774; Hammer v. Woods, 6 Tex. Civ. App. 179, 24 S. W. 942; Monteith v. Gehrig, 43 Ill. App. 465; McClelland v. Patterson (Pa.) 10 Atl. 475. Compare Chamberlain v. Hopper, 34 N. J. Law, 220.

[990] Nemetty v. Naylor, 100 N. Y. 562, 3 N. E. 497.

[991] La Farge v. Park, 1 Edm. Sel. Cas. (N. Y.) 223.

[992] Campbell v. Nixon, 2 Ind. App. 463, 28 N. E. 107.

[993] Hurley v. Lamoreaux, 29 Minn. 138, 12 N. W. 447.

[994] Cobb v. Arnold, 12 Metc. (Mass.) 39; Jones v. Reynolds, 7 Car. & P. 355.

ject of the action of ejectment is to try the title to property, while in an action of forcible entry and detainer the immediate right of possession is all that is involved, and the title cannot be inquired into for any purpose."[995] "It is plain that in a proceeding for a forcible entry and detainer, it is the mere naked possession in fact which is put in issue, and of course the judgment in such case can be no evidence in an action of ejectment, in which the right of entry is the point in issue."[996] Nor does the judgment furnish any evidence of a right in the plaintiff to recover in an action for mesne profits.[997] But notwithstanding its inconclusiveness upon the title, the judgment in this species of action is final and binding as to all questions actually and necessarily litigated and determined. It is evidence of the right and extent of the plaintiff's possession, and the defendant is estopped from contesting the same.[998] So, also, in a special statutory class of actions called by this name, the judgment is conclusive as to the existence of the relation of landlord and tenant between the parties, and as to the defendant's wrongful holding over, and these issues cannot be again tried under color of a suit in chancery.[999] A verdict and judgment of restitution in an action of forcible entry and detainer for a tract of land, part of a larger tract, all of which is claimed by the defendant under the

[995] Riverside Co. v. Townsend, 120 Ill. 9, 9 N. E. 65; Vahle v. Brackensieck, 145 Ill. 231, 34 N. E. 524; Lancaster v. Snow, 184 Ill. 534, 56 N. E. 813; People's Pure-Ice Co. v. Trumbull, 17 C. C. A. 43, 70 Fed. 166; Mattox v. Helm, 5 Litt. (Ky.) 185, 15 Am. Dec. 64; Fish v. Benson, 71 Cal. 428, 12 Pac. 454; Williams v. Newcomb, 16 Mo. App. 185; Harvie v. Turner, 46 Mo. 444; Carter v. Scaggs, 38 Mo. 302; Wanborg v. Karst, 4 Mo. App. 563; Walls v. Endel, 20 Fla. 86; Fain v. Miles (Ky.) 60 S. W. 939; Fishburne v. Engledove, 91 Va. 548, 22 S. E. 354; Robinson v. Allison, 97 Ala. 596, 12 South. 382; Richardson v. Callihan, 73 Miss. 4, 19 South. 95; Westmoreland v. Richardson, 2 Tex. Civ. App. 175, 21 S. W. 167; House v. Reavis, 89 Tex. 626, 35 S. W. 1063; Deisher v. Gehre, 45 Kan. 583, 26 Pac. 3; Redden v. Tefft, 48 Kan. 302, 29 Pac. 157; Soden v. Roth, 9 Kan. App. 826, 61 Pac. 500; Gladwell v. Hume, 18 Ohio Cir. Ct. R. 845; Bishop v. Perrin (Ariz.) 35 Pac. 1059; Dale v. Doddridge, 9 Neb. 138, 1 N. W. 999.

[996] Mattox v. Helm, 5 Litt. (Ky.) 185, 15 Am. Dec. 64.

[997] Casey v. McFalls, 3 Sneed (Tenn.) 115.

[998] Mitchell v. Davis, 23 Cal. 381; Hukill v. Guffey, 37 W. Va. 425, 16 S. E. 544.

[999] Norwood v. Kirby's Adm'r, 70 Ala. 397. But see Keating v. Springer, 146 Ill. 481, 34 N. E. 805, 22 L. R. A. 544, 37 Am. St. Rep. 175.

same alleged title, is conclusive, in a subsequent ejectment between the same parties, upon the question of the right of possession at the date of the forcible entry, not only as to the tract actually detained by the defendant but as to the whole.[1000] But judgment for the defendant is not sufficient to bar a second suit, without extrinsic proof that the cause of action was the same in the prior as in the second suit. Where the only demand of possession shown appears to have been made after the determination of the first suit, the judgment for the defendant therein cannot be held a bar to a second action brought after such demand.[1001]

§ 664. Action to Quiet Title.

In an action to quiet title, all matters affecting the title of the parties to the action may be litigated and determined, and the judgment therein is final and conclusive.[1002] A general finding of title in the plaintiff, and consequently of no title in the defendant, is a conclusive and binding decision against the defendant on the question of title, from whatever source it may be derived, and forever estops him from asserting a claim of title which existed at the time

[1000] Bradley v. West, 68 Mo. 69. But a judgment for the possession of land, rendered in a suit for forcible detainer, is not conclusive as to the ownership of a crop planted on the land before the action was commenced, and grown during the pendency thereof. McKean v. Smoyer, 37 Neb. 694, 56 N. W. 492.

[1001] Merrin v. Lewis, 90 Ill. 505.

[1002] City and County of San Francisco v. Le Roy, 138 U. S. 656, 11 Sup. Ct. 364, 34 L. Ed. 1096; Starr v. Stark, 1 Sawy. 275, Fed. Cas. No. 13,316; Indiana, B. & W. R. Co. v. Allen, 113 Ind. 308, 15 N. E. 451; Davis v. Lennen, 125 Ind. 85, 24 N. E. 885; Morarity v. Calloway, 134 Ind. 503, 34 N. E. 226; Hall v. Craig, 125 Ind. 523, 25 N. E. 538; Utley v. Fee, 33 Kan. 683, 7 Pac. 555; Reed v. Douglas, 74 Iowa, 244, 37 N. W. 181, 7 Am. St. Rep. 476; Bryan v. Alexander, 111 N. C. 142, 15 S. E. 1031; Hanchett v. Auditor General, 124 Mich. 424, 83 N. W. 103; Smith v. Chicago, M. & St. P. Ry. Co., 83 Wis. 271, 53 N. W. 550; Doyle v. Hallam, 21 Minn. 515. See Muffley v. Turner, 141 Ind. 580, 40 N. E. 913. A decree in a proceeding under the "burnt records act," finding the title to land in petitioner as against defendant, has the effect of settling the title as between the parties as effectually as though rendered on a bill to quiet title, or to remove a cloud from title, and cuts off every defense the defendant might have interposed. Harms v. Coryell, 177 Ill. 496, 53 N. E. 87.

of the finding and judgment.[1003] When a decree, on a bill to correct a mistake in the description of land in a deed, finds that the place at which the survey was commenced was not the correct one, but the survey should have commenced at another point, in an action of ejectment between the parties the question of boundary is res judicata, and the decree conclusive upon them as to its correctness.[1004]

§ 665. Dower Proceedings.

In a proceeding for dower, where the land is treated by the parties and recognized by the court as belonging to the estate of the deceased husband, and the title as being in his heirs, the judgment rendered is conclusive between the parties and those claiming under them, and hence the widow in such case will be estopped from setting up title in herself to the land embraced in the proceeding.[1005]

§ 666. Foreclosure Suits.

An action to foreclose a mortgage does not ordinarily involve a consideration of the question of title. But the title may be put in issue in such a suit, and if it is put in issue and actually passed upon and determined, the decree adjudicating it will be as binding and conclusive upon the parties as if rendered in any other species of action.[1006] In any case, the judgment is final and conclusive as to the validity of the mortgage,[1007] the power of the mortgagor to execute it,[1008] the fact that the debt secured remains unpaid,[1009] and that the mortgagor's equity of redemption is barred.[1010] So, in a

[1003] Marion County Com'rs v. Welch, 40 Kan. 767, 20 Pac. 483; Burton v. Huma (C. C.) 37 Fed. 738.

[1004] Mueller v. Henning, 102 Ill. 646.

[1005] Sigmon v. Hawn, 86 N. C. 310; Gay v. Stancell, 76 N. C. 369.

[1006] Bundy v. Cunningham, 107 Ind. 360, 8 N. E. 174; Ulrich v. Drischell, 88 Ind. 354; Graydon v. Hurd, 5 C. C. A. 258, 55 Fed. 724. See Walraven v. Farmers' & Merchants' Nat. Bank (Tex. Civ. App.) 53 S. W. 1028.

[1007] Black v. Caldwell (C. C.) 83 Fed. 880; Finley v. Houser, 22 Or. 562, 30 Pac. 494; Northern Trust Co. v. Crystal Lake Cemetery Ass'n, 67 Minn. 131, 69 N. W. 708.

[1008] Craighead v. Dalton, 105 Ind. 72, 4 N. E. 425.

[1009] Sibley v. Alba, 95 Ala. 191, 10 South. 831.

[1010] Allen v. Allen, 106 Cal. 137, 39 Pac. 436.

proceeding to foreclose a contract for the sale of real estate as a mortgage, the identity of the land described therein, the breach of the same, and the amount remaining due thereon, are material issues determined by the decree.[1011] If a personal judgment for a deficiency is given against the mortgagor, the decree is also conclusive upon the question of his liability therefor,[1012] except in the case where the mortgagor is a nonresident and is not personally served with process within the state, and does not appear in the action; in this event, the judgment will not preclude him from contesting his liability for a deficiency, but it will be conclusive as to the ownership of the mortgage and as to the right of the mortgagee to have the lands sold and applied on the debt secured by the mortgage.[1013] In actions of this kind, as in others, the doctrine of virtual representation may apply. Thus, where, in a suit to foreclose a mortgage, all the persons having vested estates, and some of those having contingent estates in remainder, are made parties defendant, a decree of foreclosure rendered therein is binding upon a person born pending suit whose only interest is a contingent remainder of the same class as that of those who are parties to the suit, since he is before the court by representation.[1014] But it seems that the judgment is not binding on the wife, heir, or administrator of the deceased mortgagor, if they are not made parties to the action.[1015] A similar rule applies to other lien claimants, such as mortgagees senior or junior to the plaintiff. If joined as defendants in the action, their interests will be concluded by the decree; but otherwise not.[1016] General creditors cannot question the construction placed on a mortgage of their debtor's property, in a suit to foreclose, to which all persons having an interest in the mortgaged property are

1011 Kloke v. Gardels, 52 Neb. 117, 71 N. W. 955.

1012 Ward v. Obenauer, 119 Mich. 17, 77 N. W. 305.

1013 In re James, 146 N. Y. 78, 40 N. E. 876, 48 Am. St. Rep. 774.

1014 McCampbell v. Mason, 151 Ill. 500, 38 N. E. 672.

1015 Beer v. Thomas, 13 Tex. Civ. App. 30, 34 S. W. 1010.

1016 Mann v. Peck, 45 W. Va. 18, 30 S. E. 206; Case v. Bartholow, 21 Kan. 300; Jacobie v. Mickle, 70 Hun, 599, 24 N. Y. Supp. 87; Stanbrough v. Cook, 83 Iowa, 705, 49 N. W. 1010. See Scribner v. York, 89 Iowa, 737, 55 N. W. 10; Banning v. Sabin, 45 Minn. 431, 48 N. W. 8; English v. Aldrich, 132 Ind. 500, 31 N. E. 456, 32 Am. St. Rep. 270; Brill v. Shively, 93 Cal. 674, 29 Pac. 324.

made parties.[1017] But on the other hand, a judgment foreclosing a mortgage in a suit in which the question whether or not the mortgage was executed to defraud the mortgagor's creditors is not in issue does not preclude a creditor of the mortgagor, who was not a party to the foreclosure suit, from attacking the mortgage on that ground.[1018]

§ 667. Award of Arbitrators upon Title to Land.

An award of arbitrators, although it cannot of itself transfer the title of real estate, may decide in whom the title is; and it will conclude the party against whom it is made, and those claiming under him, from again contesting such title, and the party in whose favor the title is determined may avail himself of the award, in a subsequent action, by way of estoppel.[1019] According to the supreme court of Pennsylvania, "It is certain that an award cannot make an actual transfer of the title to land, and therefore it appears in some of the old cases an inference was falsely drawn that it was not conclusive on the title. Supposing that in strict law it was so, it did not follow that equity would not decree a specific performance, after which the award would become conclusive. No agreement short of a conveyance can make a transfer of land, yet it is the daily business of chancery to compel the performance of such agreements; and with us, who have no chancery, a decree for specific performance is considered as made in all cases where a chancellor would make it. No satisfactory reason has been given why the proprietors of land should not have as much power to bind the title by an award as the title to personal property. The same policy which permits one is applicable to the other, and indeed the fluctuation of sentiment on this subject seems at length to have settled down into an opinion

[1017] Omaha & St. L. Ry. Co. v. O'Neill, 81 Iowa, 463, 46 N. W. 1100.

[1018] Brookes v. Munoz, 125 N. Y. 256, 26 N. E. 258. And see Thomas v. McDonald, 102 Iowa, 564, 71 N. W. 572; Clements v. Davis, 155 Ind. 624, 57 N. E. 905.

[1019] Shelton v. Alcox, 11 Conn. 240; Carey v. Wilcox, 6 N. H. 177; Porter's Lessee v. Matthews, 2 Har. (Del.) 30; Sellick v. Addams, 15 Johns. (N. Y.) 197; Cox v. Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; Murray v. Blackledge, 71 N. C. 492; Loring v. Whittemore, 13 Gray (Mass.) 228; Girdler v. Carter, 47 N. H. 305.

conformable to common sense,—that the owners of property, either real or personal, may submit the title to the decision of arbitrators, whose award shall be conclusive." [1020]

§ 668. Bankruptcy Proceedings.

Where the title to land has been passed upon by the federal court in proceedings in bankruptcy, in which the court had jurisdiction of the parties and property, the judgment is conclusive on the same parties in the state court.[1021]

PART VIII. JUDGMENTS IN ACTIONS CONCERNING CHATTELS.

§ 669. Trespass.

A recovery in trespass for a wrongful taking of property, where damages are given for the taking only, is no bar to an action of trover for a subseqent conversion to recover the value.[1022] But if the defendant have judgment in an action of trespass, this will preclude the plaintiff from afterwards maintaining his action to recover the value of the same goods.[1023] A plea of not guilty, in an action of trespass for taking and carrying away chattels, does not put in issue the question of the right of property; it is merely a traverse of the alleged wrongful taking.[1024] In general, the judgment in this species of action will not be conclusive upon the question of ownership, unless it appears that that was the issue actually litigated and passed upon. Thus in an action of trover to recover certain property, between the claimant of title thereto and the person in possession of the same, who had purchased it at a constable's sale, the defendant offered in evidence the record of a judgment in favor of the sureties on the constable's bond in an action of trespass against them for his alleged wrongful levy on the same property and the sale of it to the present defendant. But it was held that the judgment

1020 Davis v. Havard, 15 Serg. & R. 165, 16 Am. Dec. 537.

1021 Smith v. Walker, 77 Ga. 289, 3 S. E. 256.

1022 Stewart v. Martin, 16 Vt. 397.

1023 Rice v. King, 7 Johns. (N. Y.) 20; Johnson v. Smith, 8 Johns. (N. Y.) 383.

1024 Harris v. Miner, 28 Ill. 135.

was not evidence. For the verdict in trespass, in favor of the sureties, may not have involved the title to the property, but may have turned on very different issues.[1025]

§ 670. Trover.

A judgment in an action of trover against the defendant's warrantee, rendered upon a trial involving only the defendant's title to chattels as against that of the plaintiff, is a bar to an action by the plaintiff against the defendant himself, involving the same issue and to be supported by the same testimony.[1026]

§ 671. Replevin.

Generally speaking, the one fact established by a judgment in replevin, is the right of the successful party to the immediate possession of the property in question, and upon that point the judgment is conclusive.[1027] But "while it is true that in the action of replevin, ordinarily, the only question is the right of possession, yet if the party interested in the subject-matter of the controversy interposes and sets up special matter to defeat the claim, that matter is concluded by that litigation." [1028] The question of title is not necessarily in issue in replevin, and where it is not put in issue by the pleadings, an adjudication thereon is extrajudicial and void; and evidence, otherwise admissible, that a chattel mortgage on the property remains unpaid, is not rendered inadmissible by the adjudication in such case.[1029] In order that the judgment may be conclusive upon

[1025] Greaves v. Middlebrooks, 59 Ga. 240.

[1026] Atkinson v. White, 60 Me. 396.

[1027] Allen v. Butman, 138 Mass. 586; Schwenk v. Widemeyer, 60 Hun, 579, 14 N. Y. Supp. 456. See Hannon v. O'Dell, 71 Conn. 698, 43 Atl. 147.

[1028] Missouri Pac. R. Co. v. Levy, 17 Mo. App. 501. But a judgment for plaintiff in replevin will not debar the defendant from asserting against the plaintiff personally a claim for compensation for the care of the property replevied, which was not set up in the replevin suit. Wright v. Broome, 67 Mo. App. 32.

[1029] McFadden v. Ross, 108 Ind. 512, 8 N. E. 161; Huffman v. Knight, 36 Or. 581, 60 Pac. 207. But it is said that, where the record in replevin fails to disclose what issues were litigated, a finding by the court against plaintiff, and judgment that he take nothing by his complaint, are conclusive of

the question of ownership, it must clearly appear that that was the issue actually determined. Thus, where, under the plea of non detinet, the jury found that the defendant "did unlawfully detain the goods," and was silent as to the property therein, and the judgment was "that the plaintiff do have and retain the goods," it was held that the only matter here adjudicated was the right to retain and possess the goods merely at the time, and that the question of title was not concluded.[1030] A defendant in replevin is not estopped by a judgment for the return of a certain deed from asserting title to the real estate therein described.[1031] It is well settled that issues tried and determined in a replevin suit cannot be again presented in an action on the replevin bond.[1032] And if the question of ownership was actually in issue and decided in the plaintiff's favor in the replevin suit, the judgment will estop the defendant and his sureties from asserting, in an action on the replevin bond, that the defendant was the owner of the property.[1033] But if the finding merely decides that the plaintiff is entitled to the possession of the property, evidence showing that he is not the owner is competent for the defendant, on the question of damages.[1034] And a finding of title in the plaintiff is not conclusive, in a subsequent action on the bond, as to the fact of the ownership of the goods at a date prior to that on which the suit was brought.[1035] As to the parties concluded by a judgment in replevin, but little need be added to the rules previously given in relation to the persons bound by judgment estoppels.

all issuable matters; and, in a subsequent action by defendants to recover the value of the property, plaintiff having failed to return it, the latter cannot show by extraneous evidence that the prior action did not determine the right of ownership. Fromlet v. Poor, 3 Ind. App. 425, 29 N. E. 1081.

1030 Emmons v. Dowe, 2 Wis. 322.

1031 Daggett v. Daggett, 143 Mass. 516, 10 N. E. 311.

1032 Denny v. Reynolds, 24 Ind. 248; Cox v. Hartranft, 154 Pa. 457, 26 Atl. 304; Christiansen v. Mendham, 26 Misc. Rep. 662, 56 N. Y. Supp. 655.

1033 McFadden v. Fritz, 110 Ind. 1, 10 N. E. 120; Brady v. Beadleston, 62 Hun, 548, 17 N. Y. Supp. 42; Sconce v. Long Bell Lumber Co., 54 Mo. App. 509. Where title to land is put in issue in replevin for logs cut therefrom, the judgment determining the title to the logs conclusively fixes the title to the land as between the parties and their privies. Wolf River Lumber Co. v. Brown, 88 Wis. 638, 60 N. W. 996.

1034 Hawley v. Warner, 12 Iowa, 42; Buck v. Rhodes, 11 Iowa, 348.

1035 Henry v. Ferguson, 55 Mich. 399, 21 N. W. 381.

Such adjudication is equally binding on an intervening claimant as on either of the primary parties.[1036] But a judgment in replevin against the carrier of goods, replevied while in transit, does not estop the consignee, who was not a party to the action, and in nowise participated therein, from setting up his claim to the goods.[1037] If goods have been taken by replevin from an attaching officer, a judgment in favor of the plaintiff in the replevin suit is conclusive evidence of title in him, as against the attaching plaintiff, and also as against a person who, after the replevin, and having notice thereof, has caused a further attachment of the goods to be made.[1038] At the common law, and unless changed by statute, the rule is that a judgment of nonsuit in an action of replevin is not a bar to a second replevin.[1039] As to the operation of a recovery in this action as a bar to a subsequent controversy, between the same parties, it will depend entirely upon the identity of the causes of action. Thus, if one brings replevin and loses his case, he cannot afterwards bring trespass for the same taking of the same goods.[1040] On the other hand, where plaintiff sued defendant in replevin for furniture which the latter had taken from plaintiff's house, under a chattel mortgage which had ceased to have any legal validity, and recovered the property and also damages for its detention; and afterwards the plaintiff sued the same defendant in trespass for breaking into her house and removing said furniture and offering her personal indignities, it was held that the judgment in the replevin suit was not a bar to the action of trespass, though the record might be offered in mitigation of damages.[1041] So, also, a judgment for the lienholder in replevin, brought to recover possession of goods held as a lien for board, is not a bar to an action by the lienholder on the board bill.[1042] Judgment for plaintiff in replevin for the recovery of certain hotel furniture claimed by him as head of a family, is not a bar

[1036] Witter v. Fisher, 27 Iowa, 9.

[1037] Frank v. Jenkins, 22 Ohio St. 597.

[1038] Carlton v. Davis, 8 Allen (Mass.) 94. And see McDowell v. Gibson, 58 Kan. 607, 50 Pac. 870.

[1039] Daggett v. Robins, 2 Blackf. (Ind.) 415, 21 Am. Dec. 752.

[1040] Ewald v. Waterhout, 37 Mo. 602.

[1041] Briggs v. Milburn, 40 Mich. 512. See Robinson v. Kruse, 29 Ark. 575.

[1042] Rosenow v. Gardner, 99 Wis. 358, 74 N. W. 982.

to an action for the value of the use of similar furniture in the hotel, as to which defendant had wrongfully deprived plaintiff of the use.[1043] And recovery in replevin of part of a fraudulent purchase of goods is not a bar to trover for the remainder, those recovered being all that were in defendant's possession when the writ issued.[1044] On the same principle, judgment in a replevin suit brought to recover chattels wrongfully taken from the owner's possession, is not a bar to a subsequent proceeding by him against the same defendant to recover damages for the conversion of money or other irrepleviable property, taken at the same time.[1045] And where, in replevin, the owner obtains judgment merely for the value of the property, and not for its return, such judgment, while unsatisfied, is no bar to another action to recover the same property from one who has purchased it from the judgment debtor, with or without notice.[1046] But defendant in replevin, who has recovered damages for wrongful detention, is barred thereby from suing for damages on account of depreciation in the property.[1047]

§ 672. Detinue.

The action of detinue proceeds upon the ground of property in the plaintiff at the time of action brought, and therefore the recovery in that action proves no more than that, at the time of its institution, the right of property, either absolute or special, was in the plaintiff; and it does not conclude the parties as to the title or right to the property at a time antecedent to the action.[1048]

[1043] Mathews v. Herron, 102 Iowa, 45, 67 N. W. 226.

[1044] Reid, Murdoch & Co. v. Ferris, 112 Mich. 695, 71 N. W. 484, 67 Am. St. Rep. 437.

[1045] Lovell v. Hammond Co., 66 Conn. 500, 34 Atl. 511.

[1046] Ledbetter v. Embree, 12 Ind. App. 617, 40 N. E. 928.

[1047] Teel v. Miles, 51 Neb. 542, 71 N. W. 296. And see Shepherd v. Moodhe, 8 Misc. Rep. 607, 29 N. Y. Supp. 392.

[1048] Hughes v. Jones, 2 Md. Ch. 178; Wittick v. Traun, 25 Ala. 317.

CHAPTER XIX.

FORMER RECOVERY AS A BAR.

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PART I. GENERAL PRINCIPLES.

§ 673. Estoppel by Former Judgment.

It has already been shown that there is an important difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action; or in other words, between the principle of estoppel by former recovery and the rule of the conclusiveness of a judgment upon a particular point litigated and decided. This difference is chiefly noticeable as respects the identity of the subject-matter in the successive suits, and as respects the scope of the estoppel, as to the matters decided by it.[1] Using this distinction as a principle of classification, we have proceeded, in a former chapter, to discuss in detail the doctrine of res judicata in its application to the finality of an adjudication upon the points or matters in issue. We are now brought to a consideration of the other branch of the general subject, viz., the doctrine of merger, or of estoppel by former recovery. The main rule deducible from the multitude of authorities upon this subject may be expressed as follows: A judgment rendered by a court of competent jurisdiction, on the merits, is a bar to any future suit, between the same parties, or their privies, upon the same cause of action, so long as it remains unreversed.[2] This is no arbitrary rule. It rests both upon acknowledged

[1] Supra, § 506; Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195.
[2] Supra, § 504, and cases cited.

technical principles, and upon sound considerations of public policy. For first, the law admits no retrogression in its processes, and if a right or remedy of an inferior nature has been merged in one of a higher rank or dignity, it forbids the prosecution of an action or other proceeding upon the claim of lower order. And secondly, centuries of wisdom have approved the familiar maxim, "Nemo debet bis vexari pro unâ et eadem causa." [3] The peculiarity of this rule, it will be observed, is that it goes to the whole cause of action. A judgment may be offered as evidence in a subsequent suit upon some particular point in controversy, and may finally dispose of that question, and yet not overthrow the whole case. But when a former recovery is pleaded in bar, it must, if established, destroy the entire cause of action. In order to produce this result, it is said, the judgment must be shown to be between the same parties acting in the same character or quality, and to be founded on the same cause of action and demand.[4]

Now an examination of the possible cases in which a former judgment may be relied on as a bar will show that they may all be classified under the following heads:—

1. The defendant pleads that the plaintiff formerly recovered judgment against him upon the very same cause of action upon which he now sues. The plea is good, upon the principle of merger.

2. The defendant pleads that the same plaintiff formerly sued him upon the identical cause of action now set up, but he, the defendant, then recovered judgment. This plea also is good.

3. The defendant pleads a set-off or counterclaim. To this the plaintiff replies that the identical set-off or counterclaim was formerly made the basis of an action against him by the present defendant (or was formerly set up by the present defendant as a set-off to another suit between the same parties), and that, in such former controversy, said defendant recovered judgment (or was defeated) or had his set-

[3] 5 Coke, 61.

[4] Slocomb v. Lizardi, 21 La. Ann. 355, 99 Am. Dec. 740. In California, the Code of Civil Procedure, § 1908, declares that a judgment is a bar to a subsequent action only "when the same thing under the same title" is litigated. See South San Bernardino Land & Imp. Co. v. San Bernardino Nat. Bank, 127 Cal. 245, 59 Pac. 699.

off allowed (or rejected.) In either of these cases, the former judgment is well pleaded.[5]

4. The plaintiff's cause of action is a judgment which he formerly recovered against the same defendant. Here the latter is precluded from setting up any defense on the merits which he made or might have made in the original action.

In this enumeration we have not specifically mentioned the case where the plaintiff is barred of his action because his claim constitutes part of an entire and indivisible demand and therefore ought to have been included in the former suit; nor the case where the defendant's set-off is rejected because he ought to have set it up in the former action. But these are in reality corollaries to the rules already mentioned. Of the four typical cases given above, we are concerned, in this chapter, with the first three. The fourth will find a more appropriate place for its discussion in the chapter concerning suits on judgments.

§ 674. Doctrine of Merger.

Merger is the extinction of a lower right or remedy consequent upon its legal transformation or absorption into one of a higher force or dignity. For our present purpose, it may be defined as the consumption of a right of action by the recovery of a judgment upon it. "No principle is better settled than that a judgment or decree establishes in the most conclusive manner the sum due upon the claim sued upon. The cause of action is merged in the judgment, and can never again become the basis of any claim against the defendant in the judgment. The original claim has, by being sued upon and merged in the judgment, lost its vitality and expended its force and effect."[6] Thus, where a judgment is recovered for a debt due by a bond, the debt is thereby changed into a matter of record and merged in the judgment, and the plaintiff's remedy is upon the latter

[5] A judgment against a claimant, which is a bar to another suit on the claim, is also a bar to the use by him of the same claim by way of set-off. Jones v. Richardson, 5 Metc. (Mass.) 247.

[6] Ries v. Rowland (C. C.) 11 Fed. 657; Cooksey v. Kansas City, St. J. & C. B. R. Co., 74 Mo. 477.

security while it remains in force.[7] So where judgment is recovered on a note, it is merged and extinguished, and a second judgment cannot be had thereon between the same parties.[8] So where a judgment has been obtained against a corporation for the price of goods sold, an action cannot be maintained against it for fraud in obtaining a credit for the goods; the judgment for the purchase-price is as complete and full a remedy as would be a judgment for damages because of the fraud, and two judgments cannot be obtained against the defendant as an indemnity for the same loss.[9] But in order that the principle of merger may apply, it is necessary that the identical cause of action should have passed into judgment, in a litigation between the same parties or their privies, and that the plaintiff should have had a full and complete opportunity to recover his whole demand. In a case in Arkansas, it was held that a judgment against a steamboat,—that being a judgment in rem and not enforceable against the property of the owners,—if unsatisfied, could not be pleaded as a bar to a subsequent action against the owners of the boat on the same contract. In reaching this conclusion, the court said it was evident that a judgment against the vessel was not even substantially a judgment against the owners, and consequently that the former recovery relied on was no bar to the present action.[10]

[7] Grant v. Burgwyn, 88 N. C. 95, citing Higgens' Case, 6 Coke, 45; King v. Hoare, 13 Mees. & W. 494.

[8] Schuler v. Israel (C. C.) 27 Fed. 851; Connecticut Mut. Life Ins. Co. v. Jones (C. C.) 8 Fed. 303. Where a payee takes judgment on a note given as security for other notes of the same maker, the latter notes become merged in the judgment. Peoria Savings, L. & T. Co. v. Elder, 165 Ill. 55, 45 N. E. 1083. After judgment has been recovered before a justice of the peace on a judgment note, the warrant of attorney therein is functus officio, and no judgment can be entered thereon in the court of common pleas, the debt being merged in the higher security. Dixon v. Miller, 20 Pa. Co. Ct. R. 335. But where, in an action against the maker and indorser of a note, judgment is obtained against the indorser alone, the note is not merged in the judgment so as to prevent an action thereon by the indorser. Still v. Lombardi, 8 Tex. Civ. App. 315, 27 S. W. 845. And see McLennan v. McMonies, 23 U. C. Q. B. 114; Tarleton v. Allhusen, 2 Adol. & El. 32.

[9] Caylus v. New York, K. & S. R. Co., 76 N. Y. 609.

[10] Toby v. Brown, 11 Ark. 308. And see Tabor v. The Cerro Gordo (D. C.) 54 Fed. 391.

§ 675. Merger by Decree in Equity.

A decree in equity for the payment of money, merges the original debt in the same manner and to the same extent as a judgment at law. Thus, to an action upon a bond a plea was filed, setting forth that before the bringing of the action, a decree for deficiency had been made in a suit for foreclosure of a mortgage given for the same debt, and it was held that the plea was good.[11] "The view of the pleader," said the court in the case cited, "was that the recovery by way of a decree under the statute was a bar against any other action upon the original cause of action. The notion of plaintiff's counsel is that a decree is not a judgment in a sense that implies a merger of the original cause of action, and that, therefore, the bond is still suable. The point made is that no action will lie on a decree, as it will upon a judgment, and that therefore a decree has not the qualities of a judgment in respect to its effect in extinguishment of the original ground of the suit." But without admitting that this contention was correct, the learned judge proceeded to say: "The denial of a right of action upon such ground would not, in my judgment, render such a decree less conclusive in bar of another suit for the same cause of action; for the question is whether the decree amounts to a determination of the rights of the parties in respect to the identical matter involved in the present action. If so, it is a bar. The doctrine of res judicata is plain and intelligible, and amounts simply to this: that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterwards be litigated by a new proceeding either by the same or any other tribunal. And this is true whether the first adjudication is in a court of law or equity. A decree in chancery may be given in evidence between the same parties, or those claiming under them; for their judgments must be of authority in those cases where the law gives them jurisdiction; for it were very absurd that the law should give them jurisdiction, and yet not suffer what

[11] Mutual Life Ins. Co. v. Newton, 50 N. J. Law, 571, 14 Atl. 756. And see Laur v. People, 17 Ill. App. 448; Meyer v. Meyer, 40 Ill. App. 94; Foster v. The Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125.

is done by force of that jurisdiction to be full proof. Hence it is settled that a verdict and judgment of a court of record, or a decree in chancery, puts an end to all further controversy concerning the points thus decided between the parties to the suit. If the decree is final, then its result is to merge the original cause of action."

§ 676. Foreign and Sister State Judgments.

In studying the doctrine of merger it becomes important to inquire as to the effect, in this respect, of judgments rendered in foreign states and countries. The modern doctrine in England and America, as will be shown more fully hereafter, is that a judgment recovered in the courts of a foreign nation does not merge the original cause of action, and therefore will not prevent a new suit upon it in the home courts.[12] But a judgment recovered in a court of record of any one of the United States will merge the original claim or demand and may be pleaded in bar of a new suit on such claim or demand in any other state. If the plaintiff desires to have execution of his recovery in a second state, he must sue upon the judgment.[13]

§ 677. New Debt created by the Judgment.

One of the most important results of the merger of a cause of action in the judgment recovered upon it is that thereby a new debt is created. Thenceforth the original claim or demand is extinguished, or is transformed into a new obligation. But whether the nature of the new debt is affected by the nature of the old claim,—whether the judgment is independent of the characteristics of the cause of action which it has absorbed,—whether two judgments must be differently considered and differently enforced on account of a diversity in the nature of the demands on which they are severally founded,—these are questions upon which the authorities exhibit much variety of opinion. For instance, does a cause of action sounding in tort become metamorphosed into a contract by the recovery of a judgment upon it? It seems to be settled, upon the very high-

[12] See infra, § 847.

[13] See infra, § 864. And see Harrington v. Harrington, 154 Mass. 517, 28 N. E. 903; Stearns v. Wiborg, 123 Mich. 584, 82 N. W. 283.

est authority, that a judgment founded upon an action of tort cannot be considered as a contract within the meaning of that clause of the federal constitution which prohibits the states from passing any law "impairing the obligation of contracts."[14] Yet it has also been held that, under a statute authorizing claims ex contractu to be offered in set-off, a judgment may be so offered, notwithstanding it was rendered in an action of tort.[15] Again, it is said that although the original contract was tainted with usury, this blemish does not follow it into judgment, and the new debt created by the judgment is not affected thereby.[16] In an early case in Ohio, the action was upon a judgment recovered in another state upon a forfeited recognizance, taken in consequence of an alleged violation of the penal laws of the latter state; and it was contended for the defendant that "the courts of one state will not enforce the penal laws of a sister state." But the court said: "The suit is for the recovery of a sum of money. It is founded on judgments obtained in the supreme court of the state of Connecticut, and not on the penal laws of that state."[17] As another illustration of this transforming power of a judgment, we may mention that where an administrator recovers judgment on a debt due to his intestate, the new debt thereby created is due to him, and consequently he may sue upon it in the courts of another state, although, as administrator, he could not have sued upon the original claim outside of the state which granted his letters.[18] On the other hand, it has been broadly declared that "whenever justice requires it, a judgment will be adjudged to be an old debt in a new form, and will not be regarded as creating a new

[14] Garrison v. New York City, 21 Wall. 196, 22 L. Ed. 612; Louisiana v. City of New Orleans, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; Black. Const. Prohib. § 131. See supra, vol. 1, §§ 9–11.

[15] Taylor v. Root, *43 N. Y. 335. A verdict in an action of tort does not convert the tort into a debt; it does not become a debt until it is merged in a judgment. Stauffer v. Remick, 37 Kan. 454, 15 Pac. 584.

[16] Thatcher v. Gammon, 12 Mass. 268.

[17] Spencer v. Brockway, 1 Ohio, 259, 13 Am. Dec. 615.

[18] Biddle v. Wilkins, 1 Pet. 586, 7 L. Ed. 315; Talmage v. Chapel, 16 Mass. 71; Slauter v. Chenowith, 7 Ind. 211; Young v. O'Neal, 3 Sneed (Tenn.) 55; Hall v. Harrison, 21 Mo. 227, 64 Am. Dec. 225; Allen v. Lyman, 27 Vt. 20; Trecothick v. Austin, 4 Mason, 16, Fed. Cas. No. 14,164.

debt."[19] Thus, a judgment will merge a mortgage as a cause of action, but will not destroy its lien.[20] So property fraudulently conveyed may be subjected to the creditor's claim, and the grantee charged as a trustee, although the original debt is transformed into a judgment, and the judgment is rendered after the conveyance.[21] Again, the holder of a note, who, after the maker's voluntary assignment, obtains judgment on it, is not debarred from filing a claim for the amount of the judgment against the estate, since the debt is not so merged in the judgment as to make a new debt lacking the old one's incidental right to share in the assets.[22] So in a case where the defendant applied to the court to have an execution against him stayed and the judgment satisfied, by reason of a certificate of discharge in insolvency proceedings, it was held that the court had a right to go behind the judgment and examine the pleadings, and where they showed that the original claim was created by fraud, and therefore not barred by the discharge, it was not so merged in the judgment as to create a new debt subject to be discharged by the insolvency certificate.[23]

§ 678. Estoppel by Election.

It is held that when a party has elected to sue upon a written contract as it is, and has suffered a defeat, he is bound by that election, and cannot thereafter bring an action to reform the contract; but the former judgment may well be pleaded in bar against him.[24] Also, as will be shown more fully in a later section,[25] a party cannot escape the estoppel of a judgment merely by varying the form of his action. But in a suit for the amount of a forged note sold

[19] Donald v. Kell, 111 Ind. 1, 11 N. E. 782; Madison Tp. v. Dunkle, 114 Ind. 262, 16 N. E. 593.

[20] Curtis v. Gooding, 99 Ind. 45; Pence v. Armstrong, 95 Ind. 191; Manns v. Brookville Nat. Bank, 73 Ind. 243.

[21] Stout v. Stout, 77 Ind. 537; Bump, Fraud. Conv. 498.

[22] Second Nat. Bank v. Townsend, 114 Ind. 534, 17 N. E. 116.

[23] Carit v. Williams, 74 Cal. 183, 15 Pac. 751; Murphy v. Manning, 134 Mass. 488.

[24] Steinbach v. Relief Fire Ins. Co., 77 N. Y. 498, 33 Am. Rep. 655. For similar rulings, see supra, § 632.

[25] Infra, § 729.

to plaintiff by defendant, based, in one count, on the implied warranty that the note was genuine, and, in another, on the want of consideration for the purchase price thereof, where plaintiff was required to elect between the two counts, and proceeded on the former one, it was held that a judgment against him thereon would be no bar to the reinstatement of the other count and a trial thereon.[26]

PART II WHAT JUDGMENTS OPERATE AS A BAR.

§ 679. Constitution of the Court.

In order that a judgment should operate as a merger of the cause of action, or as a bar to a subsequent suit between the same parties, it is first of all necessary that it should have proceeded from a lawful court of justice. Without this, it is of no avail whatever as res judicata or as an estoppel to a second action. We have already discussed in detail the character and constitution of the court, with reference to the validity of its judgments, and the rules and authorities applicable to the present subject may be seen at large in our earlier sections.[27]

§ 680. There must be a valid Judgment.

Supposing the sentence relied on as a bar to have emanated from a lawfully organized court, it is necessary, in the next place, that it should be in the nature of a judgment, and a valid and subsisting judgment.[28] For example, an order of a probate court that a return of sale of land made by a guardian be recorded, under the statute, is simply a ministerial act, and does not conclude the parties in interest

[26] Ware v. McCormack, 96 Ky. 139, 28 S. W. 157.

[27] See supra, vol. 1, § 173, and vol. 2, § 516.

[28] Cackley v. Smith, 47 Kan. 642, 28 Pac. 617, 27 Am. St. Rep. 311; Chattanooga, R. & C. R. Co. v. Jackson, 86 Ga. 676, 13 S. E. 109. Where there have been two adjudications of the same matter between the same parties, with opposite results, the estoppel of one judgment will neutralize that of the other, and both parties may assert their claims anew. Shaw v. Broadbent, 129 N. Y. 114, 29 N. E. 238. The mere setting aside of a verdict for plaintiff, with the remark by the court that a nonsuit should have been entered, without showing why, is not such a judgment for defendant as may be availed of in bar of the same claim against his estate in the orphans' court. In re Dunlevy's Estate, 10 Pa. Co. Ct. R. 454.

from investigating the conduct of the guardian in making the sale.[29] Again, it is generally necessary that the adjudication should have been made in adversary proceedings. Thus, petitions for laying out and discontinuing highways are not proceedings wherein a former adjudication may be asserted as working an estoppel, as in an ordinary action at law, since such petitions are of necessity addressed largely to the discretion of the court.[30] But further, it is imperatively necessary that there should be a valid judgment. A judgment or decree rendered by a court or magistrate having no jurisdiction is a mere nullity and is no bar to a subsequent suit for the same cause of action.[31] A judgment, for instance, rendered by a justice of the peace, where the subject-matter of the suit was not within his statutory jurisdiction, cannot operate as an estoppel in another suit between the same parties.[32] So where the record shows that the court had no jurisdiction of one of the parties, such record is not admissible in evidence against such party.[33] It will be observed that a void judgment does not merge the cause of action. Hence, if a plaintiff recovers judgment on his demand, but, because of want of jurisdiction in the court, the same is entirely void, there is nothing to prevent him from bringing a second suit upon the same cause of action.[34] So a judgment which is ineffectual, by reason of a mistake

[29] Holbrook v. Brooks, 33 Conn. 347.

[30] Ferguson v. Town of Sheffield, 52 Vt. 77.

[31] Hancock v. Flynn, 54 Hun, 638, 8 N. Y. Supp. 133; Plummer v. Hatton, 51 Minn. 181, 53 N. W. 460; Springer v. Shavender, 118 N. C. 33, 23 S. E. 976, 54 Am. St. Rep. 708; Kansas City, P. & G. R. Co. v. Moon, 66 Ark. 409, 50 S. W. 996; Colby v. Parker, 34 Neb. 510, 52 N. W. 693; Reading v. Price, 3 J. J. Marsh. (Ky.) 61, 19 Am. Dec. 162; Clark's Adm'r v. Stroud, 1 Swan (Tenn.) 274; Semple v. Bank of British Columbia, 5 Sawy. 394, Fed. Cas. No. 12,660; Yon v. Baldwin, 76 Ga. 769.

[32] Kintz v. McNeal, 1 Denio (N. Y.) 436; Wamsley v. Robinson, 28 La. Ann. 793; Basom v. Taylor, 39 Mich. 682; Blin v. Campbell, 14 Johns. (N. Y.) 432; Johnson v. Logan, 68 Ill. 313; McCarty v. Kinsey, 154 Ind. 447, 57 N. E. 108.

[33] Rhoades v. Delaney, 50 Ind. 468.

[34] Briscoe v. Stephens, 2 Bing. 213; Blakeslee v. Murphy, 44 Conn. 188; Reed v. Chilson, 142 N. Y. 152, 36 N. E. 884; Zalesky v. Iowa State Ins. Co., 102 Iowa, 512, 70 N. W. 187; McCadden v. Slausen, 96 Tenn. 586, 36 S. W. 378. Nor is it necessary that the former judgment should first be reversed; it is a mere nullity. Green v. Clawson, 5 Houst. 159. Compare Levey v. Norton, 10 Pa. Co. Ct. R. 278.

in the name of one of the plaintiffs, will not preclude them from bringing a new suit to recover upon the original demand.[35] On the same principle, a judgment recovered by default in one state, by an administrator appointed in another state, on a demand due to the intestate from a citizen of the first state, is no bar to a suit on the same demand by an administrator of the same intestate duly appointed in the first state, although execution on the first judgment was levied on the debtor's property and returned satisfied.[36]

§ 681. Erroneous or Irregular Judgments.

But although there must be jurisdiction in the court in order to make its judgment a bar, it is not necessary that it should be free from reversible errors. A former adjudication, remaining unreversed, will constitute a bar to any other suit between the parties founded upon the same cause of action, where it is not absolutely void, although it may abound in errors and irregularities.[37] Thus a decree which grants relief in excess of that asked for is none the less a bar to a subsequent suit upon the same matters; it is at most irregular and not subject to collateral impeachment.[38] Again, where an improper set-off has been admitted in a cause in a justice's court and tried, the record in that action is a bar to another action brought on the subject of such set-off.[39] On the same rule, where a prisoner

[35] Wixom v. Stephens, 17 Mich. 518, 97 Am. Dec. 205.

[36] Pond v. Makepeace, 2 Metc. (Mass.) 114.

[37] Phillips v. Lewis, 109 Ind. 62, 9 N. E. 395; Kelley v. Mize, 3 Sneed (Tenn.) 59; Davis v. Trump, 43 W. Va. 191, 27 S. E. 397, 64 Am. St. Rep. 849; Osborn v. United States, 9 Ct. Cl. 153; Tankersly v. Pettis, 71 Ala. 179; Wolverton v. Baker, 86 Cal. 591, 25 Pac. 54; Thornton v. Eppes, 6 Fla. 546; Parker v. Wright, 62 Ind. 398; Town v. Smith, 14 Mich. 348; Colburn v. Woodworth, 31 Barb. (N. Y.) 381; Griffin v. Long Island R. Co., 102 N. Y. 449, 7 N. E. 735; Bolton v. Hey, 168 Pa. 418, 31 Atl. 1097; Gale v. Best, 20 Wis. 44; Fluker v. Herbert, 27 La. Ann. 284; Smith v. Borden, 17 R. I. 220, 21 Atl. 351, 11 L. R. A. 585, 33 Am. St. Rep. 867. See Hecht v. Mothner, 4 Misc. Rep. 536, 24 N. Y. Supp. 826. Where a plaintiff was entitled to relief only in equity, but his bill was erroneously dismissed on the ground that he had an adequate remedy at law, and he did not appeal from such decree, the decision in equity was conclusive against him, preventing his maintaining an action at law. Barnett v. Smart, 158 Mo. 167, 59 S. W. 235.

[38] McCrillis v. Harrison Co., 63 Iowa, 592, 19 N. W. 679.

[39] McLean v. Hugarin, 13 Johns. (N. Y.) 184.

is brought before a court or judge having jurisdiction of the person and subject-matter, on habeas corpus, and is discharged, the discharge, even though it may be erroneous, is final and conclusive, and the prisoner cannot be again arrested and committed on the same charge.[40]

§ 681a. Judgment Procured by Fraud.

Numerous decisions hold that a judgment duly rendered by a court of competent jurisdiction is none the less conclusive, or not the less a complete bar to the further litigation of the same cause of action between the same parties, because it may have been procured by the fraud of the successful party.[41] On the other hand, there are authorities to the effect that, when a former judgment between the parties is pleaded in bar of the present action, it may be shown by way of replication that the judgment pleaded was fraudulently obtained, and thereby its effect as an estoppel will be avoided.[42] If the suit in which the judgment was entered was merely collusive,—that is, a fraudulent arrangement between the parties of record to trick the real party in interest out of his rights,—there is good ground for holding that the latter should not be prejudiced by it as an estoppel or a bar to his proper claims.[43] But the manufacture and use of perjured testimony is not fraud of the kind which will justify courts in disregarding the estoppel of a judgment apparently regular and fair on its face.[44]

§ 682. Verdict without Judgment no Bar.

A verdict, without a judgment entered upon it, is of no validity, either as an estoppel or as evidence.[45] It has been thought, however,

[40] Ex parte Jilz, 64 Mo. 205, 27 Am. Rep. 218.

[41] Peninsular Iron Co. v. Eells, 32 U. S. App. 348, 15 C. C. A. 189, 68 Fed. 24; Whitaker v. Merrill, 28 Barb (N. Y.) 526.

[42] Mount v. Scholes, 120 Ill. 394, 11 N. E. 401; Hallack v. Loft, 19 Colo. 74, 34 Pac. 568.

[43] Town of Andes v. Ely, 158 U. S. 312, 15 Sup. Ct. 954, 39 L. Ed. 996; Tennessee Coal, Iron & R. Co. v. Hayes, 97 Ala. 201, 12 South. 98; Kerr v. Blodgett, 25 How. Prac. 303.

[44] Gusman v. Hearsey, 28 La. Ann. 709, 26 Am. Rep. 104; Ross v. Wood, 70 N. Y. 8; Verplanck v. Van Buren, 11 Hun, 328.

[45] Needham v. Bremner, L. R. 1 C. P. 583; Reed v. Proprietors of Locks

in some cases, that this is only because the verdict is liable to be set aside, or to be rendered ineffectual by the granting of a new trial, or of a motion in arrest of judgment, and consequently, when these reasons do not exist, that there is no longer any objection to the giving of a conclusive operation to the mere verdict.[46] Thus where the statute required a justice of the peace to enter judgment upon the findings of the jury, allowing him no discretion whatever in the way of granting a new trial or arresting the judgment, it was held that the verdict would bar a second suit upon the same cause of action, although the justice omitted to enter judgment upon it.[47] This view derives indirect support from the authorities which hold that the acquiescence of the parties in the verdict, as evidenced by positive acts, will obviate the necessity of entering judgment upon it to make it a bar.[48] Thus in Pennsylvania, the record of a verdict for damages, to be released on the performance of a certain act by the defendant, where no motion for a new trial or in arrest of judgment is

& Canals on Merrimac River, 8 How. 274, 12 L. Ed. 1077; Smith v. McCool, 16 Wall. 560, 21 L. Ed. 324; Whitaker v. Bramson, 2 Paine, 209, Fed. Cas. No. 17,526; Saylor v. Hicks, 36 Pa. 392; Ferguson v. Staver, 40 Pa. 213; Chester City Presbyterian Church v. Conlin, 11 Pa. Super. Ct. 413; Lorillard v. Clyde, 99 N. Y. 196, 1 N. E. 614; De Forest v. Andrews, 27 Misc. Rep. 145, 58 N. Y. Supp. 358; Humphreys v. Browne, 19 La. Ann. 158; Attica State Bank v. Benson, 8 Kan. App. 566, 54 Pac. 1037; Dunlap v. Robinson, 12 Ohio St. 530; Gurnea v. Seeley, 66 Ill. 500; Schurmeier v. Johnson, 10 Minn. 319 (Gil. 250); McReady v. Rogers, 1 Neb. 124, 93 Am. Dec. 333; Gapen v. Bretternitz, 31 Neb. 302, 47 N. W. 918; Pearson v. Post, 2 Dak. 220, 9 N. W. 684; In re Holbert's Estate, 57 Cal. 257. Compare Kane v. Dulex, 3 E. D. Smith, 127; Perry v. King, 117 Ala. 533, 23 South. 783; Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608.

[46] See Hume v. Schintz, 90 Tex. 72, 36 S. W. 429; Id., 91 Tex. 204, 42 S. W. 543; Ball v. Trenholm (D. C.) 45 Fed. 588. In Massachusetts, it is said that a verdict in favor of the plaintiff conclusively establishes his right to the property in suit, where there is no showing that a judgment will not follow in due course, although a continuance was granted after the verdict was rendered. Downer v. Cripps, 170 Mass. 345, 49 N. E. 644.

[47] Felter v. Mulliner, 2 Johns. (N. Y.) 181.

[48] See Webster v. Dundee Mortg. & Trust Co., 93 Ga. 278, 20 S. E. 310. In Georgia, it is said that, while a declaration and a verdict thereon in the plaintiff's favor, upon which no judgment was ever entered, are not admissible to show an adjudication of the matters set forth in such declaration, or as a conclusive estoppel against the defendant therein as to such matters, they are competent for the purpose of showing, as between the parties and

made, but judgment is not entered on the verdict, in consequence of the performance of the required act by the defendant, is conclusive as to the same matters coming directly in question in another suit, unless obtained by fraud or collusion.[49] So where the defendant obtains a verdict for costs, which the plaintiff pays, this constitutes an acquiescence in the verdict and a renunciation of the right to further prosecute the claim adjudicated in that suit, and will bar another action thereon, even though no formal judgment be entered on the verdict.[50] The same principles which prevent a verdict without a judgment from becoming a bar, in the generality of cases, also apply to certain parallel cases. Thus, "a master's report is not evidence as an adjudication between the parties until it has been accepted and judgment rendered upon it."[51] So also it is held that special findings of a jury in an action at law, not confirmed by a judgment of the court, nor essential to nor involved in the general verdict, are not conclusive of the facts found, on either party, in another trial of the same cause.[52]

§ 683. Judgment Reversed or Vacated.

The reversal of a judgment throws the whole matter open and destroys its effect as an estoppel; the judgment no longer effects a merger of the cause of action, and it does not bar a second action on the same demand.[53] Thus, where a judgment by confession is re-

their privies in estate, the independent fact that such a verdict was rendered in the case in which that declaration was filed, and are admissible, if otherwise relevant, to show that the parties were at that time at issue upon the particular facts therein pleaded, and as a circumstance, in connection with other and independent evidence, tending to show acquiescence in the verdict and its consequences, to be weighed by the jury in determining whether such acquiescence was attributable to the verdict itself, or to other and distinct causes. Carstarphen v. Holt, 96 Ga. 703, 23 S. E. 904.

[49] Estep v. Hutchman, 14 Serg. & R. (Pa.) 435.

[50] Pollitz v. Schell (C. C.) 30 Fed. 421.

[51] Nash v. Hunt, 116 Mass. 249.

[52] Hawks v. Truesdell, 99 Mass. 557. And see Whitney v. Bayer, 101 Mich. 151, 59 N. W. 414.

[53] City of Aurora v. West, 7 Wall. 82, 19 L. Ed. 42; French v. Edwards, 4 Sawy. 125, Fed. Cas. No. 5,097; Goodrich v. Bodurtha, 6 Gray (Mass.) 323; Fries v. Pennsylvania R. Co., 98 Pa. 142; Smith v. Frankfield, 77 N. Y. 414; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Borden Manuf'g Co. v. Barry, 17 Md. 419; Flemings v. Riddick's Ex'r, 5 Grat. (Va.) 272, 50 Am.

versed on appeal, for the reason that the power was insufficient, and is remanded to the court below for further proceedings, it is no longer a bar to a second suit for the same cause of action.[54] In a recent case, the plaintiff sued the defendants in a state court and recovered judgment, but the appellate court, reviewing the case, decided the points of law involved in it against the plaintiff, set aside the judgment for error in the ruling of the court below, and sent the case back for a new trial; the plaintiff then became nonsuit, and brought his action in the United States circuit court on the same demand. It was held that he was not estopped.[55] In another case, it appeared that the defendant company was sued for damages on a contract to furnish free switching privileges. It pleaded as res judicata a decree against it and another railroad. The decree had been appealed to the supreme court by the other company and there reversed. It was against this defendant to make certain switch connections, and against the other company to allow them to be made. It was held that, as the decree was of such a joint character, if reversed as to one it was reversed as to both, and could not avail the defendant as a bar, although it did not appeal from it.[56] Again, where a particular point was adjudicated on the trial of an action, and an appeal was taken from the judgment, but on the appeal the court above entirely omitted to consider that point, it was held that it was not res judicata when it came up in a subsequent suit; for the taking the appeal vacated the judgment, and the point was not determined again above.[57] But a secondary or dependent judgment may

Dec. 119; Taylor v. Smith, 4 Ga. 133; Board of Education of City and County of San Francisco v. Fowler, 19 Cal. 11; Poole v. Seney, 70 Iowa, 275, 24 N. W. 520; Chicago Forge & Bolt Co. v. Rose, 69 Ill. App. 123; Porter v. Leache, 56 Mich. 40, 22 N. W. 104; Jenkinson v. Hilands, 146 Pa. 380, 23 Atl. 394; Roll v. Davison, 165 Pa. 392, 30 Atl. 987; McElroy v. Mumford, 62 Hun, 619, 16 N. Y. Supp. 691; Surget v. Newman, 43 La. Ann. 873, 9 South. 561; King v. Mollohan, 61 Kan. 683, 60 Pac. 731; Stanbrough v. Cook, 86 Iowa, 740, 53 N. W. 131; Chicago, R. I. & P. Ry. Co. v. Berg, 57 Ill. App. 521; Clodfelter v. Hulett, 92 Ind. 426; Edgar v. Greer, 10 Iowa, 279; Atkison v. Dixon, 96 Mo. 582, 10 S. W. 163.

[54] Edgar v. Greer, 10 Iowa, 279.

[55] Bucher v. Cheshire R. Co., 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795.

[56] Pittsburgh, Ft. W. & C. R. Co. v. Reno, 123 Ill. 273, 14 N. E. 195.

[57] Turley v. Turley, 85 Tenn. 251, 1 S. W. 891.

in some cases stand, although the original or principal judgment falls. Thus, a decree confirming the title of a purchaser of land at execution sale is conclusive against the parties and their privies, although the judgment on which the execution was issued is afterwards reversed on writ of error.[58] What happens when a judgment is reversed, generally happens also when it is opened, vacated, or set aside by the court which rendered it,—it is no longer conclusive or a bar.[59] And the verdict of a former jury in the same cause, which has been set aside by the court, is not evidence.[60]

§ 684. Effect of Granting New Trial.

In some of the states it is held that where a verdict has been given, but a motion for a new trial is pending, the former verdict is conclusive in a suit begun in the interval on the same cause of action.[61] But in Illinois, where the plaintiff in ejectment, after judgment against him, obtains a new trial under the statute, and by amendment makes a new party defendant, and before a second trial dismisses his suit, the former judgment is no bar to a second action brought by him against such new defendant. The effect of the new trial, it is argued, is to vacate and render wholly inoperative the prior judgment, and leave the parties as they stood before the trial, except that the plaintiff cannot claim a second new trial under the statute in the same suit. And thereafter such prior judgment can-

[58] Gould v. Sternburg, 128 Ill. 510, 21 N. E. 628, 15 Am. St. Rep. 138.

[59] Small's Appeal (Pa.) 15 Atl. 807. After a judgment by confession is opened, the confession may be given in evidence as an admission of the amount due, but may be overcome by other evidence, and is not an estoppel. Earnest v. Hoskins, 100 Pa. 551. A judgment, in an action against a county on a contract, adjudging the contract invalid for want of authority in the county to make it, is not a bar to a subsequent suit on the same contract after it has been legalized by a curative act of the legislature. Steele County v. Erskine, 39 C. C. A. 173, 98 Fed. 215.

[60] Ridgely v. Spenser, 2 Bin. (Pa.) 70.

[61] Casebeer v. Mowry, 55 Pa. 419, 93 Am. Dec. 766; Young v. Brehl, 19 Nev. 379, 12 Pac. 564, 3 Am. St. Rep. 892; Chase v. Jefferson, 1 Houst. (Del.) 257; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589. But compare People v. Holladay, 93 Cal. 241, 29 Pac. 54, 27 Am. St. Rep. 186; Fresno Milling Co. v. Fresno Canal & Irrigation Co. (Cal.) 36 Pac. 412; Taylor v. Smith, 4 Ga. 133; Brown v. Cody, 115 Ind. 484, 18 N. E. 9.

not be pleaded or given in evidence for any purpose in any subsequent suit.[62] So in Texas, where a judgment on a verdict against one and in favor of the other defendants, who are jointly and severally sued, is set aside, and a new trial granted on the motion of the former, such judgment is not res judicata as to the latter defendants.[63]

§ 685. Pendency of Appeal.

According to the doctrine accepted in some of the states, upon the recovery of a judgment the cause of action is destroyed by merger, and the granting of an appeal does not revive it so that another suit may be maintained on it, nor does it impair the judgment, but the latter continues to subsist until reversed and set aside. In such case the defendant, if sued again during the pendency of the appeal, may plead a former recovery in bar.[64] Reasonable as this view appears, it must be admitted that it is opposed by a settled line of decisions in numerous other states.[65] But at any rate, though an application for an appeal may be filed, if it is never allowed or perfected, and no

[62] Sheldon v. Van Vleck, 106 Ill. 45; Preachers' Aid Soc. v. England, Id. 125. Compare Ferris v. Udell, 139 Ind. 579, 38 N. E. 180.

[63] Gulf, C. & S. F. R. Co. v. James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743.

[64] Ransom v. City of Pierre, 41 C. C. A. 585, 101 Fed. 665; Creighton v. Keith, 50 Neb. 810, 70 N. W. 406; Cloud v. Wiley, 29 Ark. 80; Moore v. Williams, 132 Ill. 589, 24 N. E. 619, 22 Am. St. Rep. 563; People v. Rickert, 159 Ill. 496, 42 N. E. 884; Mercantile Nat. Bank v. Corn Exch. Bank, 73 Hun. 78, 25 N. Y. Supp. 1068; Thompson v. Giffin, 69 Tex. 139, 6 S. W. 410; Smith v. Schreiner, 86 Wis. 19, 56 N. W. 160, 39 Am. St. Rep. 869; Buchanan v. Logansport, C. & S. W. Ry. Co., 71 Ind. 265; Willard v. Ostrander, 51 Kan. 481, 32 Pac. 1092, 37 Am. St. Rep. 294; Curtis v. Donnell, 3 Mont. 211; Souter v. Baymore, 7 Pa. 415, 47 Am. Dec. 518.

[65] Southern Ry. Co. v. Brigman, 95 Tenn. 624, 32 S. W. 762; Naftzger v. Gregg, 99 Cal. 83, 33 Pac. 757, 37 Am. St. Rep. 23; In re Blythe's Estate, 99 Cal. 472, 34 Pac. 108; Brown v. Campbell, 100 Cal. 635, 35 Pac. 433, 38 Am. St. Rep. 314; Story v. Story & Isham Commercial Co., 100 Cal. 41, 34 Pac. 675; Harris v. Barnhart, 97 Cal. 546, 32 Pac. 589; Byrne v. Prather, 14 La. Ann. 653 (compare Succession of Gaines, 45 La. Ann. 1237, 14 South. 233); Ketchum v. Thatcher, 12 Mo. App. 185; Sherman v. Dilley, 3 Nev. 21; Haynes v. Ordway, 52 N. H. 284; De Camp v. Miller, 44 N. J. Law, 617; Texas Trunk R. Co. v. Jackson, 85 Tex. 605, 22 S. W. 1030; Cunningham v. Holt, 12 Tex. Civ. App. 150, 33 S. W. 981. And see, supra, § 510, and cases there cited.

transcript is filed in the appellate court, this will not vacate the judgment so as to affect its operation as a plea in bar.[66]

§ 686. Effect of Discontinuance.

In New York, the discontinuance of an action destroys all its effect and throws the whole matter at large. Thus, the plaintiff began a foreclosure on a mortgage, and having obtained the usual judgment, and also a judgment that the defendant was liable for a deficiency, he did not proceed to a sale, but obtained an order of discontinuance and began an action on the bond. The trial court held that the adjudication in the foreclosure case absolutely estopped the defendant from giving any evidence to defeat or diminish the plaintiff's recovery. But on appeal, it was held that this was error; that by the discontinuance of an action, it is as if it had never been.[67] In Pennsylvania, on the other hand, if the plaintiff, after suit brought, enters on the docket "ended and debt and costs paid," it is held equivalent to an entry of satisfaction and may be pleaded in bar of a new suit for the same cause of action.[68] In the absence of a formal entry of judgment, it is difficult to see how this entry (or the other usual formula "settled and discontinued") could operate as a bar on the strict principle of estoppel by former recovery. For it is the judgment alone which merges the cause of action, and even a verdict, without a judgment upon it, is no bar. But such an agreement of record would no doubt produce the same effect if pleaded and given in evidence as proof of a compromise and settlement.

§ 687. Decision of Court without Jury.

It is true that a verdict without a judgment upon it is no bar to another suit, but the converse of this would not be true. On the contrary, when a case is legally and properly tried by the court alone, without the aid of a jury, its judgment is just as binding and conclusive upon the parties as if based upon a verdict.[69] And the fact

[66] Hubbell v. United States, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. Ed. 136.

[67] Loeb v. Willis, 100 N. Y. 231, 3 N. E. 177.

[68] Phillips v. Israel, 10 Serg. & R. 391; Rose v. Roseburg & M. Turnpike Co., 3 Watts, 46.

[69] Bassett v. United States, 9 Wall. 38, 19 L. Ed. 548; Dauchy v. Goodrich,

that the court's decision was wrong does not give the injured party a right to bring another suit upon the same claim, for he might have appealed and had the error corrected.[70] But while "it is the general duty of the court trying a case to find upon all the issuable facts, yet findings which are not necessarily included in and become a part of the judgment, are not conclusive in other actions. Even where such findings are confirmed by final judgment, they are adjudications only so far as they are necessarily included in and become a part of the judgment." [71] Where the parties to an action at law are entitled to an inquiry of damages by a jury, and are deprived of that right by the action of the court in transferring the action to equity, they will not be precluded by the decree.[72]

§ 688. Awards.

A valid award of arbitrators, upon a matter duly and properly submitted to their decision, effects a merger of the cause of action, which is thereupon completely extinguished, and the award will constitute a bar to the prosecution of an action, at law or in equity, upon the same demand. If the award is made conditional upon a payment or performance, the condition must be fulfilled before the character of finality will attach. But otherwise it is conclusive whether performed or not.[73]

§ 689. Judgment in Summary Proceedings.

The judgments rendered in summary proceedings under statutes are generally conclusive. Thus an adjudication in a landlord and tenant case is a final determination as to the rights of the parties to the premises under the lease or contract existing between them, and the tenant cannot afterwards set up any claim relating to the hold-

20 Vt. 127; Bissell v. Kellogg, 60 Barb. (N. Y.) 617; Kibbee v. Howard, 7 Wis. 150. But the findings of the court do not constitute a bar in a subsequent action between the same parties, unless followed by a judgment based thereon. Lance v. Shaughnessy, 86 Hun, 411, 33 N. Y. Supp. 515.

[70] Beall v. Pearre, 12 Md. 550.

[71] Mitchell v. Insley, 33 Kan. 654, 7 Pac. 201; Auld v. Smith, 23 Kan. 65.

[72] Creager v. Walker, 7 Bush (Ky.) 1.

[73] Brazill v. Isham, 12 N. Y. 9; supra, § 526.

ing which he might have had.[74] So where a statute provides that judgments or final orders may be obtained on motion by clients against attorneys for the recovery of money or property collected by them, an adjudication denying a motion, under this law, estops the plaintiff from subsequently bringing an action to recover the amount claimed.[75]

§ 690. Lis Pendens and Priority of Decision.

The pendency of another suit, upon the same cause of action, in another court of concurrent jurisdiction, cannot be pleaded in bar, although it is good in abatement.[76] "While it is certainly true that the pendency of a suit in one court is not a defense, although it may sometimes be good in abatement, to another suit on the same cause of action in another court of concurrent jurisdiction, it may be considered as established that when a judgment is recovered against the defendant in one of those courts, if it is a full and complete judgment on the whole cause of action, it may be pleaded as a defense to the action in that court where it is pending and undecided. Neither court would be bound to take notice of the judgment in the other court judicially, but when the matter is pleaded in due time, and it is made to appear that a judgment on the same cause of action has been recovered and is in full force and effect, that judgment must be held to merge the evidence of the debt, whether that evidence be parol or written, in the judgment first recovered." [77] It is not the priority in the commencement of one action that renders a judgment obtained therein a bar to the recovery of a second judgment in another, but because the first judgment when given, whether in the action commenced first or last, extinguishes the original cause of

[74] Nemetty v. Naylor, 100 N. Y. 562, 3 N. E. 497.

[75] Hawk v. Evans, 76 Iowa, 593, 41 N. W. 368, 14 Am. St. Rep. 247. Compare Dexter, Horton & Co. v. Sayward (C. C.) 84 Fed. 296.

[76] Whitaker v. Bramson, 2 Paine, 209, Fed. Cas. No. 17,526; Wilcox v. Kassick, 2 Mich. 165. See Roberts v. Northern Pac. R. Co., 158 U. S. 1, 15 Sup. Ct. 756, 39 L. Ed. 873.

[77] Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707; Estes v. Chicago, I. & D. Ry. Co., 72 Iowa, 235, 33 N. W. 647; Andrews v. Varrell, 46 N. H. 17; Bank of North America v. Wheeler, 28 Conn. 433, 73 Am. Dec. 683; Bryar v. Bryar (C. C.) 78 Fed. 657; Bourgeois v. Jacobs, 45 La. Ann. 1310, 14 South. 68.

action and gives to the plaintiff in lieu thereof one of a higher nature.[78]

§ 691. Judgments on Motions.

According to the doctrine of the earlier cases (and some more recent decisions), the determination of a motion or summary application is not res judicata so as to prevent the parties from drawing the same matters in question again in the more regular form of an action.[79] Thus a party is not estopped from bringing an action to set aside a judicial sale made without authority, by the fact that the court may have overruled a motion to set aside the order confirming such sale.[80] So where a motion to open a judgment rendered on a warrant of attorney is refused, the party may resort to equity, and the denial of such motion is not such a prior adjudication as to bar him.[81] But it is now said that this rule no longer obtains in its former strictness; and regard is now had less to the form of the proceeding, and more to the substance and condition of the decision.[82] Further, there is a distinction to be noted between orders made upon motions respecting collateral questions arising in the course of a trial and final orders affecting substantial rights and from which an appeal lies. The latter are res judicata and binding upon the parties, unless reversed or modified by an appellate tribunal.[83] Follow-

[78] Bank of United States v. Merchants' Bank, 7 Gill (Md.) 415; North British & M. Ins. Co. v. Cohn, 17 Ohio Cir. Ct. R. 185. Compare Bateman v. Grand Rapids & I. R. Co., 96 Mich. 441, 56 N. W. 28.

[79] Kanne v. Minneapolis & St. L. R. Co., 33 Minn. 419, 23 N. W. 854; Simson v. Hart, 14 Johns. (N. Y.) 75; Dickenson v. Gilliland, 1 Cow. (N. Y.) 495; Acker v. Ledyard, 8 Barb. (N. Y.) 514; Dryden v. St. Joseph & D. C. R. Co., 23 Kan. 525; Easton v. Pickersgill, 75 N. Y. 599; Johnston v. Brown, 115 Cal. 694, 47 Pac. 686; Wing v. De La Rionda, 125 N. Y. 678, 25 N. E. 1064; Hahl v. Sugo, 57 N. Y. Supp. 920, 27 Misc. Rep. 1.

[80] Wills v. Chandler, 2 Fed. 273.

[81] Wistar v. McManes, 54 Pa. 318, 93 Am. Dec. 700; Ashton's Appeal, 73 Pa. 153. Compare Heilman v. Kroh, 155 Pa. 1, 25 Atl. 751.

[82] Wilson County Com'rs v. McIntosh, 30 Kan. 234, 1 Pac. 572.

[83] Spitley v. Frost (C. C.) 15 Fed. 299; Buckles v. Chicago, M. & St. P. R. Co. (C. C.) 53 Fed. 566; McDonald v. Seligman (C. C.) 81 Fed. 753; Straw v. Murphy, 179 Pa. 376, 36 Atl. 162; Burner v. Hevener, 34 W. Va. 774, 12 S. E. 861, 26 Am. St. Rep. 948; Kaufman v. Schneider, 35 Ill. App. 256; Parrott v. Hodgson, 46 Ill. App. 232; Second Nat. Bank v. Haerling, 106 Iowa, 505, 76 N. W. 826.

ing these principles, it is held that when a motion to set aside a verdict is overruled and judgment rendered thereon, a similar motion in a subsequent suit between the same parties, or their privies in estate, to set aside a verdict settling the same questions in the same way, must be overruled.[84] So, to a complaint by a judgment-defendant to have a judgment declared satisfied, it is a good answer on the part of the judgment-plaintiff that the same matters alleged in the complaint were set up in answer to a motion for leave to issue execution on the judgment, and that such matters were in that proceeding adjudicated.[85] The denial of a motion to open a default, or to vacate or set aside a judgment, if not appealed from, is generally considered final and conclusive, and a bar to any further proceeding for the same purpose.[86] But on the other hand, the decision on a motion to vacate or discharge an attachment, being merely incidental or collateral to the main controversy, is not such an adjudication as will prevent the parties in interest from renewing the same contentions in another form of action or proceeding.[87] In regard to a motion to restrain the issuance of an execution, or to quash the writ, or set aside a sale made thereunder, a majority of the cases hold that the ruling thereon is a bar to any further litigation of the same issues.[88]

[84] Page v. Esty, 54 Me. 319; Grier v. Jones, 54 Ga. 154.

[85] Reeves v. Plough, 46 Ind. 350.

[86] Haneman v. Pile, 161 Pa. 599, 29 Atl. 113; Bush v. O'Brien, 47 App. Div. 581, 62 N. Y. Supp. 685; Moore v. Horner, 146 Ind. 287, 45 N. E. 341; Carlson v. Carlson, 49 Minn. 555, 52 N. W. 214; Dick v. Williams, 87 Wis. 651, 58 N. W. 1029; Chezum v. Claypool, 22 Wash. 498, 61 Pac. 157, 79 Am. St. Rep. 955; Thompson v. Connell, 31 Or. 231, 48 Pac. 467, 65 Am. St. Rep. 818. Compare Soper v. Manning, 158 Mass. 381, 33 N. E. 516; Dutton v. Smith, 10 App. Div. 566, 42 N. Y. Supp. 80; Monroe v. Monroe, 66 Hun, 635, 21 N. Y. Supp. 655; Royer v. Wolf, 8 Pa. Co. Ct. R. 641; Jensen v. Barbour, 12 Mont. 566, 31 Pac. 592; Wolff & Co. v. Canadian Pac. Ry. Co., 89 Cal. 332, 26 Pac. 825.

[87] Frazer v. Parry, 4 Kan. App. 33, 45 Pac. 724; Miami Co. Nat. Bank v. Barkalow, 53 Kan. 68, 35 Pac. 796; State v. Bierwirth, 47 Mo. App. 551; Cox v. Allen, 91 Iowa, 462, 59 N. W. 335; Quigley v. McEvony, 41 Neb. 73, 59 N. W. 767.

[88] Sherman v. Grinnell, 159 N. Y. 50, 53 N. E. 674; Reed v. Whitlow (Ky.) 43 S. W. 686; Parker v. Obenchain, 140 Ind. 211, 39 N. E. 869; Trescott v. Lewis, 12 La. Ann. 197. Compare Mills v. Pettigrew, 45 Kan. 573, 26 Pac. 33.

§ 692. Renewal of Motion in the Same Case.

The doctrine of res judicata, in its strict sense, does not apply to incidental or interlocutory orders made in the progress of a cause. The court may, on a proper state of facts, allow a renewal of such a motion once decided, but such leave will not be granted unless a new state of facts has arisen since the former hearing, or the facts were not then presented by reason of surprise or excusable neglect.[89] And even when the second motion is founded on grounds not raised on the first, it will be denied, if such grounds might have been ascertained and presented by the exercise of due diligence.[90] In a case in New Hampshire, the plaintiff presented a petition to the court of common pleas praying that an action might be brought forward upon the docket, and that a certain judgment rendered therein against him might be vacated, but the petition was dismissed on hearing. He subsequently preferred another petition in the same court, containing the same allegations in substance, depending upon the same state of facts, and praying for the same relief. It was held by the supreme court that the former proceedings had in the cause barred the second petition.[91]

[89] Ford v. Doyle, 44 Cal. 635; Chichester v. Cande, 3 Cow. (N. Y.) 39, 15 Am. Dec. 238. And see Easton v. Pickersgill, 75 N. Y. 599; Greenwood v. Marvin, 111 N. Y. 423, 19 N. E. 228; German Exchange Bank v. Kroder, 14 Misc. Rep. 179, 35 N. Y. Supp. 380; Johnson v. Stockham, 89 Md. 368, 43 Atl. 943; Wingo v. Hooper, 98 N. C. 482, 4 S. E. 463; Roulhac v. Brown, 87 N. C. 1; Turner v. Nachtsheim, 71 Wis. 16, 36 N. W. 637; Day v. Mertlock, 87 Wis. 577, 58 N. W. 1037; Sanford v. Weeks, 50 Kan. 339, 31 Pac. 1088; Rockwell v. District Court of Lake County, 17 Colo. 118, 29 Pac. 454, 31 Am. St. Rep. 265.

[90] National Bank of Port Jervis v. Hansee, 15 Abb. N. C. (N. Y.) 488.

[91] Claggett v. Simes, 25 N. H. 402. And see Bangs v. Strong, 4 N. Y. 315.

PART III. OF THE RULE THAT THE JUDGMENT MUST HAVE BEEN UPON THE MERITS.

§ 693. Merits must be Adjudicated.

The general rule is, that a former judgment will not operate as a bar to a subsequent suit upon the same cause of action unless the proceedings and judgment in the first case involved an investigation (or afforded full legal opportunity for an investigation) and determination of the merits of the suit.[92] Or, as otherwise expressed, the judgment must be upon the merits in a competent action, the plaintiff having sued in his proper character, and the pleadings having been correct.[93] "If the first suit was dismissed for defect of pleadings or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit."[94] Hence a plea of former recovery which discloses the fact that the former judgment was not on the merits, is bad on demurrer.[95] The universality and importance of this rule are attested by the supreme court of Pennsylvania in the following forcible terms: "It has been held an acknowledged principle that when it can be gathered from the record that the merits of the con-

[92] Hughes v. United States, 4 Wall. 232, 18 L. Ed. 303; Gould v. Evansville & C. R. Co., 91 U. S. 526, 23 L. Ed. 416; Billing v. Gilmer, 10 C. C. A. 579, 62 Fed. 661; Foster v. The Richard Busteed, 100 Mass. 412, 1 Am. Rep. 125; Sayles v. Tibbitts, 5 R. I. 79; People v. Barrett, 1 Johns. (N. Y.) 66; Vaughan v. O'Brien, 39 How. Prac. (N. Y.) 515; Stowell v. Chamberlain, 60 N. Y. 272; Heikes v. Com., 26 Pa. 513; Henninger v. Heald, 51 N. J. Eq. 74, 26 Atl. 449; Agnew v. McElroy, 10 Smedes & M. (Miss.) 552, 48 Am. Dec. 772; Wethered v. Mays, 4 Tex. 387; Houston v. Musgrove, 35 Tex. 594; Birch v. Funk, 2 Metc. (Ky.) 544; Kendal v. Talbot, 1 A. K. Marsh. (Ky.) 321; Thomas v. Hite, 5 B. Mon. (Ky.) 590; Cannon v. State, 17 Ark. 365; Vanlandingham v. Ryan, 17 Ill. 25; Carson v. Clark, 1 Scam. (Ill.) 113, 25 Am. Dec. 79; Delaney v. Reade, 4 Iowa, 292; Mahaffey v. Rogers, 2 Ohio Dec. 188; Winham v. Kline, 77 Mo. App. 36; Taylor v. Larkin, 12 Mo. 103, 49 Am. Dec. 119; Verhein v. Schultz, 57 Mo. 326; Wells v. Moore, 49 Mo. 230; Tucker v. Rohrback, 13 Mich. 73; Gray v. Dougherty, 25 Cal. 266.

[93] Johnson v. White, 21 Miss. 584.

[94] Hughes v. United States, 4 Wall. 232, 18 L. Ed. 303.

[95] Perkins v. Moore, 16 Ala. 9.

troversy were not passed upon in the first action, but the determination proceeded upon some technical objection not affecting the plaintiff's ultimate right to sue, the first judgment will constitute no bar to the second suit. A contrary rule would be founded in such rank injustice as to be insupportable, and had such an one been even entertained in the earlier ages of the law, when reason and truth were but too often made to give way before the fancied force of technical subtleties and hair-drawn distinctions, it must long since have succumbed to the enlightened wisdom which tolerates litigation only as a means of administering uniform justice." [96] We must not, however, lose sight of the fact that a judgment, although not upon the merits, and therefore not conclusive in respect to the very cause of action, may still be final as to the precise point upon which the determination was based. This will appear more fully hereafter. And further, although a judgment was rendered on technical grounds, or by dismissal, or generally not on the merits, yet the admissions made by a party in his pleadings in that suit may be received as evidence against him (though not conclusive) in a subsequent action between the same parties.[97]

§ 694. Meaning of the Term "Merits."

What, then, is the meaning of the term "merits"? What precise significance are we to attach to the phrase when it is said that a given judgment is or is not "on the merits"? The lexicographers define the merits of a case as the real or substantial grounds of the action, in contradistinction to any technical or collateral matter which has been raised in the course of the suit.[98] And a learned writer is of opinion that "judgment proceeds upon the merits when the very cause of action is decided upon." [99] Now in the first place, it is clearly not intended that the judgment must be meritorious in the ethical sense.[100] It is not required that the decision be righteous. Courts are to administer justice, and yet a judgment may be "on the

[96] Carmony v. Hoober, 5 Pa. 305, Bell, J.
[97] Bore's Ex'r v. Quierry's Ex'r, 4 Mart. O. S. (La.) 545, 6 Am. Dec. 713.
[98] Holthouse, Brown, Anderson, sub voce.
[99] Bigelow, Estop. p. 30.
[100] Parkes v. Clift, 9 Lea (Tenn.) 524, 531.

merits" although an unerring intelligence and infallible sense of moral right might perceive that it worked wrong. In the next place, it is not meant that the sentence must be even legally right. A judgment may abound in errors and irregularities, and yet, if not absolutely void, it stands as a final adjudication until reversed or set aside, and is just as much a bar to a subsequent suit as one that should be free from the suspicion of a flaw or blemish. And again, it is not considered necessary that there should have been an actual trial and canvassing of the facts of the case. For a judgment entered upon confession without action is as conclusive as any other. But on the other hand, it is necessary that the ultimate right of action should have been in some way involved in the decision. If the judgment goes off on an objection to the jurisdiction, or on a showing that the plaintiff has mistaken the form of action, or by reason of a defect of parties, or because the suit is premature,—in any such case it needs no argument to show that the merits have not been reached. On the whole, then, we conclude that a judgment is "upon the merits" when it amounts to a declaration of the law as to the respective rights and duties of the parties, based upon the ultimate fact or state of facts disclosed by the pleadings and evidence and upon which the right of recovery depends, irrespective of formal, technical, or dilatory objections or contentions.[101] But it is far less easy to frame an unexceptionable definition of this rather vague term, than to enumerate the various instances in which a judgment may be rendered that is not on the merits. And these different cases will be taken up singly in the following sections. In the meantime, however, the general doctrine may be made more clear by the citation of some illustrative cases. Where a mortgagor files a complaint for the purpose of obtaining relief and to have the mortgage cancelled, and the complaint is dismissed on the ground that, upon the pleadings and proof, he is not entitled to the relief demanded, he is thereby estopped, in a subsequent suit to foreclose, from denying the validity of the mortgage.[102] A decision that the subject-matter of the suit has already been determined by a valid and subsisting judgment

[101] See Besecher v. Flory, 176 Pa. 23, 34 Atl. 926; Davie v. Davis, 108 N. C. 501, 13 S. E. 240, 23 Am. St. Rep. 71.

[102] Hamilton Building Ass'n v. Reynolds, 5 Duer (N. Y.) 671.

between the parties, is a decision upon the "merits" of the case.[103] On the other hand, in a recent case it appeared that after a general demurrer to a petition had been overruled, the defendant answered, setting up matter which constituted no valid defense. The case was tried by the court, and the petition was dismissed, no reason for the decision being given. On appeal this decision was affirmed, on the ground that the petition did not state a cause of action. It was held that this judgment was no bar to another suit on the same demand, the case not having been determined upon its merits.[104] Where judgment was rendered in a suit "that the plaintiff from having and maintaining his action should be barred, and that the defendant recover his costs," this was considered to be a judgment on the merits of the action.[105]

§ 695. Judgment must be Final.

In order to bar a second action, the judgment must be final. "It is only a final judgment upon the merits which prevents further contest upon the same issue, and becomes evidence in another action between the same parties or their privies. Until final judgment is reached the proceedings are subject to change and modification, are imperfect and inchoate, and can avail nothing as a bar or as evidence, until the judgment, with its verity as a record, settles finally and conclusively the question at issue. An interlocutory order is not such a judgment. It is not a judgment at all." [106] Thus a judgment declaring a party guilty of contempt is not a judgment upon the merits, and does not constitute an adjudication of the rights of the litigants.[107]

[103] Buck v. Spofford, 35 Me. 526.

[104] Pepper v. Donnelly, 87 Ky. 259, 8 S. W. 441.

[105] Dixon v. Sinclear, 4 Vt. 354, 24 Am. Dec. 610.

[106] Webb v. Buckelew, 82 N. Y. 555; Whitaker v. Bramson, 2 Paine, 209, Fed. Cas. No. 17,526; Hurst v. Everett (C. C.) 21 Fed. 218; Schmidt v. Glade, 126 Ill. 485, 18 N. E. 762; Hibler v. Shipp, 78 Ky. 64; Kellam v. Rippey, 3 La. Ann. 202; McLane v. Spence, 11 Ala. 172; Stedman v. Poterie, 139 Pa. 100, 21 Atl. 219; Shober v. Wheeler, 120 N. C. 353, 27 S. E. 29; Hart v. Bank of Commerce, 51 Neb. 486, 71 N. W. 40. See Gallaher v. City of Moundsville, 34 W. Va. 730, 12 S. E. 859, 26 Am. St. Rep. 942; Bodkin v. Arnold, 45 W. Va. 90, 30 S. E. 154.

[107] Proctor v. Cole, 104 Ind. 373, 3 N. E. 106.

§ 696. Judgment upon Plea in Abatement.

On the principle that the judgment must be final, and not one that turns upon a preliminary question, it is held that when a former action between the parties was dismissed upon some matter pleaded in abatement, the decision is not a bar to a second action upon the merits.[108] But under the code system of pleading, where the defendant is authorized to set up in his answer as many defenses as he has, if an answer contains a defense which only goes to defeat the present action together with other defenses on the merits, and the issues as to both are found for the defendant, but the judgment is apparently entered for the defendant upon the finding upon the merits, the matter upon the merits will be res judicata, and the parties will be estopped from further litigating the merits, even though the issue upon the matter in abatement is also found in favor of the defendant, and the judgment might have rested upon that issue.[109] In Iowa, the Code (section 2851) requires the judgment in an action, in case matter in abatement and matter in bar are both pleaded, and it is based on the matter in abatement, to state the fact. But if the judgment fails to state on which plea it was based, it will be presumed that it was based on the matter in bar.[110] But an entry of judgment which recites that the court found that the suit was prematurely brought, and directed a verdict for defendant, sufficiently shows that judgment was rendered on a plea in abatement, and hence is no bar to another action for the same cause.[111]

[108] Jordan v. Siefert, 126 Mass. 25; Atkins v. Anderson, 63 Iowa, 739, 19 N. W. 323; Garrett v. Greenwell, 92 Mo. 120, 4 S. W. 441; Caruthers v. Williams, 53 Mo. App. 181; Clark v. Young, 1 Cranch, 181, 2 L. Ed. 74; Griffin v. Seymour, 15 Iowa, 30, 83 Am. Dec. 396; Birch v. Funk, 2 Metc. (Ky.) 544; Dunklee v. Goodenough, 65 Vt. 257, 26 Atl. 988.

[109] The 420 Mining Co. v. Bullion Mining Co., 3 Sawy. 634, Fed. Cas. No. 4,989; Sheldon v. Edwards, 35 N. Y. 279; Gundlin v. Hamburg-American Packet Co., 31 Abb. N. C. 437, 28 N. Y. Supp. 572.

[110] Garretson v. Ferrall, 92 Iowa, 728, 61 N. W. 251.

[111] Harrison v. Hartford Fire Ins. Co., 102 Iowa, 112, 71 N. W. 220, 47 L. R. A. 709.

§ 697. Judgment by Default.

A final judgment taken by default is conclusive, by way of estoppel, in respect to all such matters and facts as were well pleaded and properly raised and material to the case made by the declaration, or other pleadings, and such issues cannot be re-litigated in any subsequent action between the parties or their privies. It is just as conclusive between the parties, as to all matters necessary to support the judgment, as one rendered after answer and contest; and further, such judgment is a "judgment upon the merits," having the effect of barring any further suit between the same parties on the same cause of action.[112] "The general rule is that a default is only conclusive as to such matters as are properly averred or charged in the complaint."[113] Hence a defendant, by not answering the complaint, does not admit that the plaintiff is entitled to the relief demanded against him, but only that he is entitled to such relief as is authorized by the facts properly alleged.[114] In regard to the conclusiveness of a default judgment upon defenses which might have

[112] Leonard v. Simpson, 2 Bing. N. C. 176; Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 15 Sup. Ct. 733, 39 L. Ed. 859; Board of Com'rs of Lake County v. Platt, 25 C. C. A. 87, 79 Fed. 567; Garner v. Second Nat. Bank (C. C.) 89 Fed. 636; Derby v. Jacques, 1 Cliff. 425, Fed. Cas. No. 3,817; White v. Savage, 94 Me. 145, 47 Atl. 138; Gaskill v. Dudley, 6 Metc. (Mass.) 546, 39 Am. Dec. 750; Briggs v. Richmond, 10 Pick. (Mass.) 391, 20 Am. Dec. 526; Minor v. Walter, 17 Mass. 237; Thatcher v. Gammon, 12 Mass. 268; Newton v. Hook, 48 N. Y. 676; Jarvis v. Driggs, 69 N. Y. 143; Brown v. Mayor, etc., of City of New York, 66 N. Y. 385; Barker v. Miller, 32 App. Div. 364, 53 N. Y. Supp. 283; Henriques v. Yale University, 28 App. Div. 354, 51 N. Y. Supp. 284; McCalley v. Wilburn, 77 Ala. 549; Ellis v. Mills, 28 Tex. 584; Dunn v. Pipes, 20 La. Ann. 276; Ligon v. Triplett, 12 B. Mon. (Ky.) 283; Johnson v. Jones, 58 Kan. 745, 51 Pac. 224; Marks v. Sigler, 3 Ohio St. 358; McCurdy v. Baughman, 43 Ohio St. 78, 1 N. E. 93; Fletcher v. Holmes, 25 Ind. 458; City of St. Louis v. Lang, 131 Mo. 412, 33 S. W. 54; Doyle v. Hallam, 21 Minn. 515; Northern Trust Co. v. Crystal Lake Cemetery Ass'n, 67 Minn. 131, 69 N. W. 708; Van Valkenburgh v. City of Milwaukee, 43 Wis. 574; Kloke v. Gardels, 52 Neb. 117, 71 N. W. 955; Howard v. City of Huron, 6 S. D. 180, 60 N. W. 803; Kittridge v. Stevens, 16 Cal. 381; Seattle Nat. Bank v. School Dist. No. 40, 20 Wash. 368, 55 Pac. 317; supra, vol. 1, § 87.

[113] Barton v. Anderson, 104 Ind. 578, 4 N. E. 420.

[114] Argall v. Pitts, 78 N. Y. 239.

been presented, there is apparently some uncertainty in the decisions. According to the English rule, a defendant is not estopped from setting up a particular defense to an action, by the fact that, in a former action between the same parties, such defense would have been available, but he omitted to present it and suffered judgment by default.[115] But this doctrine is too sweeping to be accepted by our courts. And in fact there are cases going to the opposite extreme, and holding that the judgment is conclusive as to all defenses which might have been urged against the plaintiff's demand.[116] Probably, however, it is necessary to distinguish between matter which would go in avoidance of the action and such as would bar it. Take, for example, the case of a part payment which the defendant omitted to set up and which was not allowed in the judgment. It was held at one time that the default judgment would not estop him from afterwards maintaining an action to recover back the amount.[117] But the cases so holding have been overruled, and it may now be regarded as settled that in any case where the defendant neglects a legal opportunity to set up a partial payment, he cannot afterward seek credit for it by a new suit.[118] On the other hand, a judgment for rent due under a lease, rendered upon default, without release pleaded, is not conclusive evidence, in an action for subsequently accruing rent, that the term had not been surrendered and the tenant released from liability prior to the commencement of the first action; for, the release not having been set up, that question was not involved in the judgment.[119]

Thus far we have spoken of final judgments by default. The case is different with an interlocutory default judgment. The latter merely admits a cause of action, and while the precise character of

[115] Howlett v. Tarte, 10 C. B. (N. S.) 813. And see State v. Cooley, 58 Minn. 514, 60 N. W. 338; s. c. 65 Minn. 406, 68 N. W. 66.

[116] McCalley v. Wilburn, 77 Ala. 549.

[117] Rowe v. Smith, 16 Mass. 306; Fowler v. Shearer, 7 Mass. 14; Smith v. Weeks, 26 Barb. (N. Y.) 463.

[118] Fuller v. Shattuck, 13 Gray (Mass.) 70, 74 Am. Dec. 622; Binck v. Wood, 43 Barb. (N. Y.) 315; Kent v. Riley (Ky.) 47 S. W. 1082. And see infra, § 758.

[119] Hanham v. Sherman, 114 Mass. 19. And see Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195.

the cause of action, and the extent of the defendant's liability, remain to be determined by a hearing in damages and final judgment thereon, the cause of action is not merged in the judgment, and the rights of the parties, beyond the mere admission of a cause of action, are neither strengthened nor impaired thereby.[120] Yet the judgment by default will preclude the defendant from using, for the purpose of reducing the damages, any testimony which would have defeated the action had a plea in bar been put in.[121] The same general principles apply to the parallel case in equity. An order taking a bill pro confesso for want of an answer dispenses with proof at the hearing, and is conclusive that the matter of the bill is true, as if the same were confessed in an answer.[122]

§ 698. Judgment upon Confession.

A judgment entered upon confession without action is as conclusive as any other judgment, and is equally protected against collateral attack or impeachment; and, like a judgment rendered after a contestation of the merits, it operates as a merger of the cause of action, and while it remains in force, the plaintiff cannot maintain an action for the same claim or demand.[123] When a defendant offers to confess judgment for a part of the plaintiff's claim, and the plaintiff enters judgment for the amount so tendered, and proceeds to execution, he cannot recover the balance of the claim.[124] So a judgment

[120] Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 239; Whitaker v. Bramson, 2 Paine, 209, Fed. Cas. No. 17,526.

[121] Garrard v. Dollar, 49 N. C. 175, 67 Am. Dec. 271. See supra, vol. 1, § 91.

[122] Attorney-General v. Carver, 34 N. C. 231.

[123] Whitaker v. Bramson, 2 Paine, 209, Fed. Cas. No. 17,526; Barney v. Goff, 1 D. Chip. (Vt.) 304; Sheldon v. Stryker, 34 Barb. (N. Y.) 116; Neusbaum v. Keim, 24 N. Y. 325; Kirby v. Fitzgerald, 31 N. Y. 417; Braddee v. Brownfield, 4 Watts (Pa.) 474; Secrist v. Zimmerman, 55 Pa. 446; Weikel v. Long, Id. 238; Dean v. Thatcher, 32 N. J. Law, 470; State v. Mangum, 28 N. C. 369; Goff v. Dabbs, 4 Baxt. (Tenn.) 300; Jeffries v. Morgan, 1 Ark. 169; Kingman v. Paulsen, 126 Ind. 507, 26 N. E. 393, 22 Am. St. Rep. 611; Lagerquist v. Williams, 74 Ill. App. 17; North v. Mudge, 13 Iowa, 496, 81 Am. Dec. 441; Sherman v. Christy, 17 Iowa, 322; Twogood v. Pence, 22 Iowa, 543.

[124] Dodds v. Blackstock, 1 Pittsb. R. 46.

by confession entered when the cause is at issue and ready for trial in an appellate court, upon appeal from a justice's court, is conclusive upon the defendant in a subsequent action to enforce further payments upon the same contract.[125] The rule of the English cases is different in this respect from ours. It is there held that a judgment entered by confession before the formation of an issue is not conclusive of the facts on which the plaintiff's right of action depends.[126]

§ 699. Nonsuit no Bar.

It is a settled and inflexible rule that a judgment of nonsuit is not a judgment upon the merits, and therefore it is no bar to another suit upon the same cause of action.[127] Thus, in an action for claim and delivery, where the answer set up, as new matter, that in another action by defendant against plaintiff to recover the same property, a judgment of nonsuit had been rendered against him, it was held that this was no defense to the present action and that such matter

[125] Orr v. Mercer County Mut. Fire Ins. Co., 114 Pa. 387, 6 Atl. 696.

[126] Goucher v. Clayton, 11 Jur. (N. S.) 107.

[127] Homer v. Brown, 16 How. 354, 14 L. Ed. 970; Manhattan Life Ins. Co. v. Broughton, 109 U. S. 121, 3 Sup. Ct. 99, 27 L. Ed. 878; Haldeman v. United States, 91 U. S. 584, 23 L. Ed. 433; Hammergen v. Schurmeier (C. C.) 3 Fed. 77; Evans v. White, 1 Hempst. 296, Fed. Cas. No. 4,572a; Derby v. Jacques, 1 Cliff. 425, Fed. Cas. No. 3,817; Greely v. Smith, 1 Woodb. & M. 181, Fed. Cas. No. 5,749; Book v. United States, 31 Ct. Cl. 272; Inhabitants of Knox v. Inhabitants of Waldoborough, 5 Me. 185; Brett v. Marston, 45 Me. 401; Haynes v. Jackson, 66 Me. 93; Inhabitants of Jay v. Inhabitants of Carthage, 48 Me. 353; Holton v. Gleason, 26 N. H. 501; Eaton v. George, 40 N. H. 258; Morgan v. Bliss, 2 Mass. 111; Jones v. Howard, 3 Allen (Mass.) 223; Marsh v. Hammond, 11 Allen (Mass.) 483; Clapp v. Thomas, 5 Allen (Mass.) 158; Bridge v. Sumner, 1 Pick. (Mass.) 370; Beckett v. Stone, 60 N. J. Law, 23, 36 Atl. 880; Merrick v. Hill, 77 Hun, 30, 28 N. Y. Supp. 237; People v. Vilas, 36 N. Y. 459, 93 Am. Dec. 520; Wheeler v. Ruckman, 51 N. Y. 391; Audubon v. Excelsior Ins. Co., 27 N. Y. 216; Bate v. Fellowes, 4 Bosw. (N. Y.) 638; Reynolds v. Garner, 66 Barb. (N. Y.) 310; Blair v. McLean, 25 Pa. 77; Haws v. Tiernan, 53 Pa. 192; Vought v. Sober, 73 Pa. 49; Fisher v. Longnecker, 8 Pa. 410; Wortham v. Com., 5 Rand. (Va.) 669; Smith v. Floyd County, 85 Ga. 420, 11 S. E. 850; Hendrick v. Clonts, 91 Ga. 196, 17 S. E. 119; Ryan v. Fulghum, 96 Ga. 234, 22 S. E. 940; Long v. Behan, 19 Tex. Civ. App. 325, 48 S. W. 555; Johnson v. City of New Orleans, 50 La. Ann. 920, 24 South. 635; Beadle v. Graham's Adm'r, 66 Ala. 99; Allinet v. His Creditors, 15 La. Ann. 130; Baudin v. Roliff, 1 Mart. (N.

was sham and irrelevant.[128] So a nonsuit in an action against a deputy sheriff for the wrongful attachment of property is no bar to an action against the sheriff for the same cause.[129] If the plaintiff in an action of detinue suffers a voluntary nonsuit, the judgment is not conclusive on him, in a subsequent action on the bond, as to the question of ownership.[130] The dismissal of an action of ejectment at the instance of the plaintiff settles no rights of the parties, is not an admission of any right or title in the defendant, and is not a bar to, and cannot be shown in evidence in, a second action.[131] So a nonsuit suffered by the appellee, on appeal from a justice to a circuit court, is no bar to a bill in chancery founded upon the same cause of action.[132] Where a judgment is reversed and the cause remanded for further proceedings, and the plaintiff in the court below then voluntarily becomes nonsuit, he is not estopped from bringing a new action.[133]

It is further to be observed, in respect to the application of this important rule, that it makes no difference that the nonsuit was involuntary; it is still no adjudication of the merits of the cause, and hence no bar to a new suit.[134] As observed by the supreme court of Maine, "in ordering a nonsuit on account of the insufficiency of the

S.; La.) 165, 14 Am. Dec. 181; Dana v. Gill, 5 J. J. Marsh. (Ky.) 242, 20 Am. Dec. 255; Holland v. Hatch, 15 Ohio St. 464; Miller v. Mans, 28 Ind. 194; Holmes v. Chicago & A. R. Co., 94 Ill. 439; Gibbs v. Jones, 46 Ill. 319; Howes v. Austin, 35 Ill. 396; Ellington v. Crockett, 13 Mo. 72; Cheny v. Cooper, 14 Neb. 415, 16 N. W. 471; Wood v. Ramond, 42 Cal. 643; Gates v. McLean (Cal.) 9 Pac. 938; Hallum v. Dickinson, 47 Ark. 126, 14 S. W. 477; Wiethaupt v. City of St. Louis, 158 Mo. 655, 59 S. W. 960; Jacob v. Day, 111 Cal. 571, 44 Pac. 243.

128 Fleming v. Hawley, 65 Cal. 492, 4 Pac. 494.

129 Clapp v. Thomas, 5 Allen (Mass.) 158.

130 Savage v. Gunter, 32 Ala. 467.

131 Van Vliet v. Olin, 1 Nev. 495.

132 Crawford v. Summers, 3 J. J. Marsh. (Ky.) 300.

133 Holland v. Hatch, 15 Ohio St. 464; Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 14 Sup. Ct. 140, 37 L. Ed. 1107; Union Bank v. Commissioners of Oxford (C. C.) 90 Fed. 7.

134 Howes v. Austin, 35 Ill. 396; Wood v. Ramond, 42 Cal. 644; Bournonville v. Goodall, 10 Pa. 133; National Water Works Co. v. School Dist. of Kansas City, 23 Mo. App. 227; Gates v. Parmly, 93 Wis. 294, 66 N. W. 23; Denver & R. G. R. Co. v. Iles, 25 Colo. 19, 53 Pac. 222; Gummer v. Trustees of Village of Omro, 50 Wis. 247, 6 N. W. 885. In the case last cited, Orton,

plaintiff's evidence, the court simply declares the law applicable thereto. It says the facts proved by the plaintiff fail to cast any legal liability upon the defendant; but it does not attempt to determine the actual facts of the case, nor can it do so, for the law has imposed that duty elsewhere, and as the facts of the case are not determined, it does not follow that the plaintiff in some future suit may not be able to produce more and better evidence of his claim, which he is at liberty to do. This view is in full accord with the cases adjudged by courts that proceed according to the course of the common law." [135] But a compulsory nonsuit ordered by a justice of the peace is held, in some of the states, to be a bar to another action; because, as the justice has no power, in those jurisdictions, to enter any such judgment, it must be taken as equivalent to a judgment that the plaintiff has no cause of action.[136] It does not exempt a case from the operation of the principal rule to show that the judgment of nonsuit was entered upon an agreed statement of facts. According to the supreme court of the United States, "it is not only for a non-appear-

J., delivering the opinion of the court, said: "We conclude that a judgment of nonsuit, whether voluntary or involuntary, is never a bar to another action for the same cause. This rule in respect to involuntary nonsuits is not only sustained by the authorities but by reason, and is evidently recognized generally, by the courts and the bar, from the common practice of nonsuits granted on motion, without a question as to their effect in barring another action. The defendant, instead of moving for a nonsuit on the case made by the plaintiff, may, if he have confidence in his position, have a judgment which will be a bar to another action by submitting the cause to the verdict of the jury, or of the court, if a jury be waived. He should not be allowed to experiment with a motion for a nonsuit, and obtain the opinion of the court on the plaintiff's case, and if he fails in his motion, to then go to a full trial on the merits, without also allowing the plaintiff, if he is the losing party on the hearing of the motion, to sue over. If the defendant is not bound and concluded by the decision on the motion, the plaintiff should not be; and if the rule is adopted that a nonsuit granted upon the motion of the defendant is a bar to another action, then the correlative rule should be adopted also, that a decision against the motion operates as a judgment for the plaintiff."

[135] Pendergrass v. York Manuf'g Co., 76 Me. 509, citing Morgan v. Bliss, 2 Mass. 111. But compare Ordway v. Boston & M. R. R., 69 N. H. 429, 45 Atl. 243.

[136] Gould v. Crawford, 2 Pa. 89; Lawver v. Walls, 17 Pa. 75; Gillilan v. Spratt, 8 Abb. Prac. (N. S.; N. Y.) 13. See, also, Moreland Tp. v. Gordner, 109 Pa. 116.

ance, or for delays or defaults, that a nonsuit may be entered. The plaintiff's proceeding in such particulars may be altogether regular, and the pleadings may be completed to an issue for a trial by the jury; yet the parties may agree to take it from the jury with a view to submit the law of the case to the court, upon an agreed statement of facts, with an agreement that the plaintiff shall be non-prossed if the facts stated are insufficient to maintain the right which he claims. The court in such case will order a nonsuit if it think the law of it against the plaintiff, but it will declare it to be done in conformity with the agreement of the parties, and its effect upon the plaintiff will be precisely the same as if he had been non-prossed for a non-appearance when called to prosecute his suit, or for one of those delays from which it may be adjudged that he is indifferent." [137]

Wherever we find the essential characteristics of a judgment of nonsuit, whatever may be the language employed in the record-entry, the same trait of inconclusiveness attaches to the adjudication. Thus, for example, the entry of "neither party" (proceeds further with the action) is no evidence of an adjudication of the merits, and no bar to a future action; it is merely equivalent to a nonsuit and default by consent.[138] So where the record shows that the plaintiff failed to appear and his writ was "abated and dismissed," the defendant recovering five dollars and costs, this amounts to no more than a nonsuit, and will not bar a second action.[139] Again, a judgment simply dismissing the demand of an intervenor, on the ground that he was absent and not represented at the trial of the cause, cannot support the plea of res judicata. "The judgment is strictly one of nonsuit." [140] So in suits in equity where the plaintiff has a right

[137] Homer v. Brown, 16 How. 354, 14 L. Ed. 970. To the same effect, Inhabitants of Knox v. Inhabitants of Waldoborough, 5 Me. 185; Derby v. Jacques, 1 Cliff. 432, Fed. Cas. No. 3,817.

[138] Marsh v. Hammond, 11 Allen (Mass.) 483.

[139] Haws v. Tiernan, 53 Pa. 192.

[140] Bourg v. Gerding, 33 La. Ann. 1369. So, also, an order, made on motion of relator's attorney, dismissing an information in the nature of a quo warranto, without prejudice to further action in another proceeding, and giving leave to withdraw the information, is in effect an order of nonsuit on motion of relator's attorney, and not a final judgment on the merits of the cause, and does not bar a subsequent action on the same claim in another court. State v. Anderson, 26 Fla. 240, 8 South. 1.

to have his bill dismissed, and does so, because he is not ready for trial, the order of dismissal is in the nature of a nonsuit, and is no bar to another bill.[141] So where a judgment is reversed on appeal upon technical grounds not involving the merits, a simple judgment of reversal constitutes no bar to a second action for the same demand, but has the same effect as a judgment of nonsuit. And where the ground of reversal does not appear, the burden of proof is on the party who, in a subsequent suit, relies upon the adjudication as a bar.[142]

§ 700. Judgment on Retraxit.

"A retraxit is the open, public, and voluntary renunciation by the plaintiff in open court of his suit or cause of action, and if this is done by the plaintiff and a judgment entered thereon by the defendant, the plaintiff's right of action is forever gone."[143] "A retraxit differs from a nonsuit in that the one is positive and the other negative; the nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a retraxit is an open and voluntary renunciation of his suit in court, and by this he forever loses his action."[144] It is well settled, therefore, that a retraxit is a present and perpetual release of all right of action for the subject-matter of the suit, and a judgment upon it estops the retractor from ever afterwards contesting the same matter.[145] It is the admission by the plaintiff, on the record, that he has no cause of action, which constitutes the bar and operates as an estoppel.[146] But it must be done after declaration filed; otherwise it is a mere discontinuance or nonsuit, and no bar, because no cause of action is disclosed on the record.[147] A judgment entered

[141] Kempton v. Burgess, 136 Mass. 192.

[142] Vaughan v. O'Brien, 57 Barb. (N. Y.) 491.

[143] Cunningham v. Schley, 68 Ga. 105.

[144] 3 Bl. Comm. 296.

[145] Beecher v. Shirley, Cro. Jac. 211; Cunningham v. Schley, 68 Ga. 105; Thomason v. Odum, 31 Ala. 168, 68 Am. Dec. 159; Harris v. Preston, 10 Ark. 201; Lambert v. Sandford, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149; Evans v. McMahan, 1 Ala. 45; Coffman v. Brown, 7 Smedes & M. (Miss.) 125, 45 Am. Dec. 299; Lowry v. McMillan, 8 Pa. 157, 49 Am. Dec. 501; Exchange Bank v. Gilman, 17 Can. Sup. Ct. 108.

[146] Coffman v. Brown, 7 Smedes & M. (Miss.) 125, 45 Am. Dec. 299.

[147] Lowry v. McMillan, 8 Pa. 157, 49 Am. Dec. 501.

upon motion of defendant's attorney of record, with the consent of plaintiff's attorney, that "it appearing that the subject-matter in this suit has been adjusted and settled by the parties, it is therefore ordered that this cause be, and the same is hereby, dismissed," is held to be a judgment on the merits, final in form and nature, being in the nature of a judgment on retraxit, and therefore a bar to a subsequent suit against the defendant on the same cause of action.[148] But where a judgment in ejectment was entered in favor of the plaintiff, on condition that he should enter a remittitur for certain interfering surveys specifically described, such a remittitur is not a retraxit, and is not a bar to another suit.[149] And the entry of a nonsuit as to one of two co-obligors in an action on a bond is not a retraxit as to him.[150] A nominal plaintiff, assignor of a chose in action, suing for the benefit of his assignee, cannot, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action. This, it is said, would certainly not be a retraxit, and if it were, it would not avail the parties, being procured by fraud.[151]

§ 701. Discontinuance.

At the common law, "a discontinuance is somewhat similar to a nonsuit; for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend, but the plaintiff must begin again, by suing out a new original, usually paying costs to his antagonist."[152] But in modern practice this is not the sole application of the term. "The word is also frequently used to indi-

[148] United States v. Parker, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601. But it has been held that a judgment in the nature of a retraxit must be entered by the plaintiff personally, and cannot be effected by stipulation of counsel, so as to bar plaintiff's subsequent action on the same claim. Hallack v. Loft, 19 Colo. 74, 34 Pac. 568.

[149] Gibson v. Chouteau, 7 Mo. App. 1.

[150] Crawford's Adm'r v. Glass' Ex'rs, 33 N. C. 118.

[151] Welch v. Mandeville, 1 Wheat. 233, 4 L. Ed. 79. See Tate v. Bank of State of New York, 96 Va. 765, 32 S. E. 476.

[152] 3 Bl. Comm. 296.

cate that 'the plaintiff discontinues his action.' The judgment in such case is no more than an agreement not to proceed farther in that suit against that particular defendant. Such judgment is not a bar to any future action against the same party." [153]

§ 702. Judgment of Non Pros.

A judgment of non pros. is exactly similar in its effects to one of nonsuit,—that is, it is no bar to a new suit on the same cause of action. This subject was discussed in Howes v. Austin,[154] where, according to the account of the case given by the court in its opinion, "the plaintiff was called and defaulted for want of a replication to the defendant's plea to the first and second counts of the declaration. The plaintiff had failed to reply within the time required by a rule of the court. A judgment was entered that the defendant, as to those counts, go hence without day. This presents the question as to the effect of this judgment. It is contended by plaintiff in error that this judgment is a bar to a future recovery on the cause of action described in those counts, whether in the same or a different action." But after quoting from 3 Bl. Comm. 296, and 2 Archb. Pr. p. 229, the court continued: "If, as Blackstone says, it is a judgment of nonsuit, or, as Archbold says, it is a final judgment for costs only, there can be no pretense that it operates to bar a future recovery in that or any other action. Its only effect is to turn the plaintiff out of the court, on the cause of action non-prossed, leaving him at liberty to proceed for its recovery precisely as though the declaration or count non-prossed had never been filed." On the same principle, a nolle prosequi to the whole declaration is nothing more than a discontinuance, and therefore constitutes no bar to a future action.[155]

[153] Muse v. Farmers' Bank of Virginia, 27 Grat. (Va.) 252; Reynolds v. Hennessy, 17 R. I. 169, 23 Atl. 639; Dunham v. Carson, 37 S. C. 269, 15 S. E. 960; Weingartner v. Missouri Lumber & Mining Co. (Ky.) 44 S. W. 355; Shank v. Woodworth, 111 Mich. 642, 70 N. W. 140; Oliver v. Lansing, 48 Neb. 338, 67 N. W. 195. See, also, Gibson v. Gibson, 20 Pa. 9.

[154] 35 Ill. 396, 412.

[155] Lambert v. Sandford, 2 Blackf. (Ind.) 137, 18 Am. Dec. 149. And see Book v. United States, 31 Ct. Cl. 272; Gabrielson v. Waydell (C. C.) 67 Fed. 342. But in Maryland a verdict for nominal damages, followed by a judgment of non pros., is a conclusive adjudication of the amount of the debt. Berkley v. Wilson, 87 Md. 219, 39 Atl. 502.

§ 703. Dismissal of Complaint.

In those states where the code system of pleading and practice obtains, the authorities hold generally that the mere dismissal of a complaint in an action at law, even after the plaintiff has put in his evidence on the trial, has no more force than a nonsuit at common law, and does not bar a subsequent action for the same cause.[156] As there may be various sorts of nonsuits, considered with reference to the stage of the cause at which entered, and in respect to the question of the plaintiff's acquiescence, so will it be with judgments of dismissal. And in the first place, it is perfectly evident that a judgment entered upon the dismissal of a complaint because of the plaintiff's failure to appear, where there was no trial of the action and no consideration of its merits, cannot be a bar to a subsequent suit.[157] And when it appears from the record that the court never determined the merits of the controversy nor rendered any judgment affecting the same, but simply dismissed the plaintiff's action, without trial and without evidence, such judgment does not support a plea of former adjudication.[158] But again, the dismissal may be voluntary on the part of the plaintiff. Thus, where an action has been tried and a verdict for the plaintiff set aside by the court, and a new trial granted, the plaintiff has a right to dismiss or discontinue his action the same as if no trial had ever been had, and such dismissal

[156] Mechanics' Banking Ass'n v. Maripoosa Co., 7 Rob. (N. Y.) 225; Dexter v. Clark, 35 Barb. (N. Y.) 271; Colt v. Beard, 33 Barb. (N. Y.) 357; Wheeler v. Ruckman, 51 N. Y. 391; Smith v. Ferris, 1 Daly (N. Y.) 18; Bond v. McNider, 25 N. C. 440; Hukill v. Maysville & B. S. R. Co. (C. C.) 72 Fed. 745; Hauselt v. Patterson, 124 N. Y. 349, 26 N. E. 937; Gould v. Chicago, B. & Q. R. Co., 61 Hun, 625, 15 N. Y. Supp. 895; Campbell v. Potts, 119 N. C. 530, 26 S. E. 50; Rudolph v. Underwood, 88 Ga. 664, 16 S. E. 55; Kopf v. Huckins, 11 Tex. Civ. App. 86, 32 S. W. 41; Gerber v. Gerber, 155 Ill. 219, 40 N. E. 581; Jones v. Hunter, 32 Ill. App. 445; McWhorter v. Norris, 9 Ind. App. 490, 34 N. E. 854; Bank of Maywood v. McAllister's Estate, 56 Neb. 188, 76 N. W. 552; Parks v. Dunlap, 86 Cal. 189, 25 Pac. 916; Fisk v. Parker, 14 La. Ann. 491; Crews v. Cleghorn, 13 Ind. 438. But see Bostwick v. Abbott, 40 Barb. (N. Y.) 331; People v. Smith, 51 Barb. (N. Y.) 360.

[157] Miller v. McGuckin, 15 Abb. N. C. (N. Y.) 204; Hibler v. Shipp, 78 Ky. 64.

[158] Hughes v. Walker, 14 Or. 481, 13 Pac. 450.

will be no bar to another suit for the same cause of action.[159] A judgment of dismissal may also be asked for, on the trial, at the conclusion of the plaintiff's evidence in chief. And the granting of such a motion can have no greater effect upon the cause of action than an involuntary nonsuit entered at the same stage. In point of fact the two are identical. Hence the cases hold that the dismissal by the court of an action at law, while the same is on trial and "before its final submission," upon the ground that the plaintiff has failed to establish his cause of action, is not a final determination on the merits, and therefore not pleadable against another action for the same cause.[160] Indeed, in New York, the cases go so far as to hold that where, upon the trial of a legal action, at the close of the testimony upon both sides, the complaint is dismissed, this is no bar to another action for the same cause.[161] But the general disposition of the authorities is to hold that while a judgment of dismissal, where there has not been a hearing upon the merits, is not a bar to another action,[162] yet such a judgment, after a hearing on the merits, is conclusive on the plaintiff as to all facts involved in the issue.[163] In Louisiana, a judgment dismissing the plaintiff's demand

[159] Phelps v. Winona & St. P. R. Co., 37 Minn. 485, 35 N. W. 273, 5 Am. St. Rep. 867; Pierce v. Hilton, 102 Cal. 276, 36 Pac. 595. But compare McFadden v. Schroeder, 4 Ind. App. 305, 30 N. E. 711.

[160] Craver v. Christian, 34 Minn. 397, 26 N. W. 8; Andrews v. School District, 35 Minn. 70, 27 N. W. 303; Woods v. Lindvall, 4 U. S. App. 49, 1 C. C. A. 37, 48 Fed. 62.

[161] Wheeler v. Ruckman, 51 N. Y. 391. And see Louisville, N. A. & C. Ry. Co. v. Wylie, 1 Ind. App. 136, 27 N. E. 122; Phipps v. Alford, 95 Ga. 215, 22 S. E. 152. But in New York, a statute (Code Civ. Proc. § 1209) provides that a judgment of dismissal after trial shall bar a new suit for the same cause of action only where it expressly appears that the dismissal was on the merits. As to the effect of this statute, see Nicoll v. Karrick, 28 Misc. Rep. 199, 58 N. Y. Supp. 1018; Stokes v. Stokes, 49 App. Div. 302, 63 N. Y. Supp. 887; Vowell v. Twenty-Third St. Ry. Co., 14 Misc. Rep. 538, 35 N. Y. Supp. 1082.

[162] Philpott v. Brown, 16 Neb. 387, 20 N. W. 288; Burgess v. American Mortgage Co., 119 Ala. 669, 24 South. 727.

[163] Amory v. Amory, 26 Wis. 152; Brothers v. Higgins, 5 J. J. Marsh. (Ky.) 658; Best v. Hoppie, 3 Colo. 137; Hubbell v. United States, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. Ed. 136; Flanders v. Hall, 159 Mass. 95, 34 N. E. 178; Goodman v. Malcolm, 5 Kan. App. 285, 48 Pac. 439. See Cameron v. Chicago, M. & St. P. R. Co., 51 Minn. 153, 53 N. W. 199.

without any qualification of language or reservation (such as the ordinary phrase "as in case of nonsuit"), when such judgment is rendered after a trial on the issues made in the case, will be considered final and definitive, and a bar to a second action on the same subject-matter.[164]

§ 704. Judgment in Test Case.

There is one possible exception to the rule of the inconclusiveness of a nonsuit, viz., where the parties have agreed to abide by the decision that may be rendered in a test case. Thus, where several ejectments were pending between one claiming title and persons having only the naked possession of lands, and an agreement was made between all the parties that the suits should be stayed and should await the event of a suit between other parties in which the same questions arose, it was held that a judgment in that suit would operate as an estoppel between the parties to the agreement, even although the judgment was one as in case of nonsuit.[165]

§ 705. Agreed Judgments.

In regard to the conclusiveness of agreed judgments there is some difference of opinion. But the majority of cases in this country hold that a judgment is none the less effective as a bar because its merits were determined in whole or in part, by the agreement of the parties.[166] Thus, in New Jersey, it is said to be immaterial "whether

[164] Granger v. Singleton, 32 La. Ann. 898.

[165] Brown v. Sprague, 5 Denio (N. Y.) 545. Compare Gray v. Daniels, 18 App. Div. 465, 45 N. Y. Supp. 1106. See Bank of Commerce v. City of Louisville (C. C.) 88 Fed. 398. And see § 545, supra.

[166] Nashville, C. & St. L. Ry. Co. v. United States, 113 U. S. 261, 5 Sup. Ct. 460, 28 L. Ed. 971; Pelton v. Mott, 11 Vt. 148, 34 Am. Dec. 678; Chamberlain v. Preble, 11 Allen (Mass.) 370; Brown v. Sprague, 5 Denio (N. Y.) 545; French v. Shotwell, 5 Johns. Ch. (N. Y.) 555; Richmond & P. R. Co. v. Shippen, 2 Pat. & H. (Va.) 327; Hoover v. Mitchell, 25 Grat. (Va.) 387; Kidd v. Huff, 105 Ga. 209, 31 S. E. 430; Donnelly v. Wilcox, 113 N. C. 408, 18 S. E. 339; Adler v. Van Kirk Land & C. Co., 114 Ala. 551, 21 South. 490, 62 Am. St. Rep. 133; Jarboe v. Smith, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541; Wynne v. Spiers, 7 Humph. (Tenn.) 394; Dunn v. Pipes, 20 La. Ann. 276; Greenwood v. City of New Orleans, 12 La. Ann. 426; Fletcher v. Holmes, 25 Ind. 458.

the decree was obtained by consent or by a decision of the court upon the points in controversy. The conclusiveness of a judgment upon the rights of the parties does in nowise depend upon its form or upon the fact that the court investigated or decided the legal principles involved. A judgment by default or upon confession is in its nature just as conclusive upon the rights of the parties before the court as a judgment upon demurrer or verdict."[167] So in Massachusetts, an agreed statement may be the proper foundation of such a judgment as will constitute a bar to a new suit between the same parties for the same cause of action.[168] So in California, a judgment entered upon a stipulation of the parties after issue joined, has the same effect as an estoppel as if the action had been tried on the merits.[169] In Indiana it is held that the judgment will bind those by whose agreement it has been entered, notwithstanding the pleadings would not, in a contested case, authorize such a judgment.[170] A contrary rule, however, prevails in England, and has been maintained in a few cases in this country.[171] The doctrine of these cases is that nothing can be considered res judicata, except a matter upon which the court has exercised its judicial mind, coming to a conclusion that one side is right, and pronouncing a decision accordingly, and that when a judgment or decree is rendered by consent, or is the result of compromise, it cannot be admitted under this description. The argument is not without weight. And perhaps the estoppel created by such a judgment ought rather to be rested on the voluntary undertaking of the parties to abide by the result than on the strict principle of res judicata.

§ 706. Dismissal of Suit "Agreed."

By general agreement of the authorities it is now well settled that a judgment dismissing a suit "agreed" is a bar to any further action

[167] Gifford v. Thorn, 9 N. J. Eq. 702, 722.

[168] Derby v. Jacques. 1 Cliff. 425, Fed. Cas. No. 3,817.

[169] McCreery v. Fuller, 63 Cal. 30.

[170] Fletcher v. Holmes, 25 Ind. 458.

[171] Jenkins v. Robertson, L. R. 1 H. L. Sc. 117 (but compare In re South American & Mexican Co. [1895] 1 Ch. 37); Wadhams v. Gay, 73 Ill. 415; Lamb v. Gatlin, 22 N. C. 37; Edgerton v. Muse, 2 Hill, Eq. (S. C.) 51; Luckett v. Canadian & American Mortg. & Trust Co., 47 La. Ann. 1259, 17 South. 836.

for the same cause.[172] Says the court in Virginia: "The judgment of a court of competent jurisdiction, dismissing a suit agreed, upon the ground that it has been agreed by the parties, is a final determination, as to those parties, of the matters litigated in that suit. It is virtually an acknowledgment by the plaintiff in open court, as in retraxit, that the plaintiff has no cause of action, or rather no further cause of action. It is not merely an abandonment of his suit by the plaintiff, as in a nonsuit; it is the concurrent action of both parties. It is a representation by the plaintiff to the court that the suit has been agreed, which is assented to by the defendant, and thereupon the suit is dismissed agreed by the judgment of the court, without costs to either party. To say that a suit is agreed by the parties is, in effect, to say that the cause of the suit has been agreed. It is a declaration of record, sanctioned by the judgment of the court, that the cause of action has been adjusted by the parties themselves in their own way, and that the suit is dismissed agreed."[173] The exact position taken by these cases is still further defined by the supreme court of California in the following language: "We are not to be understood as holding that a mere dismissal of an action by the plaintiff under the statute, and without any agreement on his part to do so, is to be held to constitute a bar to its renewal, nor that a judgment of nonsuit, even entered by consent, would have that effect: but only that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, must be understood, in the absence of anything to the contrary expressed in the agreement and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy, by the parties themselves, through the judgment of the court, as will constitute a defense to another action afterward brought upon the same cause of

[172] Bank of the Commonwealth v. Hopkins, 2 Dana (Ky.) 395; Jarboe v. Smith, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541; Merritt v. Campbell, 47 Cal. 542; Phillpotts v. Blasdell, 10 Nev. 19; Hoover v. Mitchell, 25 Grat. (Va.) 387; Wohlford v. Compton, 79 Va. 333; Ford v. Roberts, 14 Colo. 291, 23 Pac. 322. See, per contra, Hoffman v. Porter, 2 Brock. 156, Fed. Cas. No. 6,577; Bishop v. McGillis, 82 Wis. 120, 51 N. W. 1075. And compare Allison v. Hess, 28 Iowa, 388.

[173] Hoover v. Mitchell, 25 Grat. 387.

action." [174] And if the parties are bound, so also are their privies. Thus a stipulation, by which all the parties to a suit involving the title to certain land compromised and dismissed the action, is a bar to a suit involving the title to the same property by a grantee of one of the parties who purchased with knowledge of the agreement.[175]

§ 707. Judgment on Demurrer.

There can be no doubt that a judgment rendered upon a demurrer is equally conclusive, by way of estoppel, of the facts confessed by the demurrer as would be a verdict and judgment finding the same facts.[176] But a judgment on a demurrer, based on merely formal and technical defects, is no bar to a suit on an amended declaration correctly setting forth a good cause of action.[177] For example, an action having been brought against S. individually, he pleaded in bar that he had executed the contract in question, not on his own account, but in behalf of a certain company and in his capacity of director and agent of the company and not otherwise. The plaintiff demurred, and the court gave judgment against S. for want of an averment in his plea of an authority from the company to execute the contract. It was held that this decision was not conclusive as to the question of the personal responsibility of S. on the contract, because

[174] Merritt v. Campbell, 47 Cal. 542. But a judgment of dismissal by consent, which shows on its face that it is not the result of an adjustment of the controversy, is not a bar to a subsequent suit. Marshall v. Otto (C. C.) 59 Fed. 249.

[175] Crossman v. Davis, 79 Cal. 603, 21 Pac. 963.

[176] Van Horn v. Van Horn (N. J.) 21 Atl. 1069; Jordan v. Faircloth, 34 Ga. 47; Johnson v. Pate, 90 N. C. 334; Cameron v. Hinton (Tex. Civ. App.) 48 S. W. 24; McDowell v. Chesapeake, O. & S. W. R. Co., 90 Ky. 346, 14 S. W. 338; Hyatt v. Challiss, 59 Kan. 422, 53 Pac. 467; Luttrell v. Reynolds, 63 Ark. 254, 37 S. W. 1051; City of La Porte v. Organ, 5 Ind. App. 369, 32 N. E. 342; Nispel v. Laparle, 74 Ill. 306; McKean v. Jones, 19 Can. S. C. R. 489.

[177] Gilman v. Rives, 10 Pet. 298, 9 L. Ed. 432; Aurora City v. West, 7 Wall. 99, 19 L. Ed. 42; Wiggins Ferry Co. v. Ohio & M. Ry. Co., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055; Chapin v. Curtis, 23 Conn. 388; Com. v. Goddard, 13 Mass. 456; Foster v. Com., 8 Watts & S. (Pa.) 77; Papworth v. City of Fitzgerald, 111 Ga. 54, 36 S. E. 311; Crumpton v. State, 43 Ala. 31; Alabama & V. Ry. Co. v. McCerren, 75 Miss. 687, 23 South. 423; Nickelson v. Ingram, 24 Tex. 630; Birch v. Funk, 2 Metc. (Ky.) 544; Thomas v. Bland, 91 Ky. 1, 14 S. W. 955; Griffin v. Seymour, 15 Iowa, 30, 83 Am. Dec. 396.

it turned merely upon the question of special pleading and was not on the merits.[178] So again, a former judgment on demurrer between the same parties, wherein the plaintiff claimed damages of the defendant for injury to his estate in consequence of the laying and operating a railroad in the street on which his estate abutted, the plaintiff not claiming to be the owner of the fee in the soil to the middle of the street, is not a bar to a second suit upon the same cause of action, when the new declaration supplies that important averment.[179] But on the other hand, a judgment on a demurrer which goes to the merits, disposing of the whole cause of action, is affirmed by all the authorities to be a bar to a subsequent suit upon the same claim or demand,—as completely so as though the action had been submitted to a jury and a verdict and judgment had thereon.[180] The United States supreme court, investigating the whole subject with care and thoroughness, has reached the conclusion that the authorities establish the two following propositions: "First. That a judgment rendered upon demurrer to the declaration or to a material pleading, setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record; and the rule is, that facts thus established can never after be contested between the same

[178] Skinner v. Dayton, 19 Johns. (N. Y.) 513, 10 Am. Dec. 286.

[179] Florida Southern Ry. Co. v. Brown, 23 Fla. 104, 1 South. 512.

[180] Gould v. Evansville & C. R. Co., 91 U. S. 533, 23 L. Ed. 416; Bissell v. Spring Valley Tp., 124 U. S. 232, 8 Sup. Ct. 495, 31 L. Ed. 411; Bowdoin College v. Merritt (C. C.) 63 Fed. 213; St. Johnsbury & L. C. R. Co. v. Hunt, 59 Vt. 294, 7 Atl. 277; Bouchaud v. Dias, 3 Denio (N. Y.) 238; Gray v. Gray, 34 Ga. 499; Carey v. Giles, 10 Ga. 9; Fain v. Hughes, 108 Ga. 537, 33 S. E. 1012; Straw v. Illinois Cent. R. Co., 73 Miss. 446, 18 South. 847; Perkins v. Moore, 16 Ala. 17; City Bank of New Orleans v. Walden, 1 La. Ann. 46; Parker v. Spencer, 61 Tex. 155; Cameron v. Hinton (Tex. Civ. App.) 48 S. W. 616; McLaughlin v. Doane, 40 Kan. 392, 19 Pac. 853, 10 Am. St. Rep. 210; Estep v. Larsh, 21 Ind. 190; Wilson v. Ray, 24 Ind. 156; Vanlandingham v. Ryan, 17 Ill. 25; Keater v. Hock, 16 Iowa, 23; Felt v. Turnure, 48 Iowa, 397; Coffin v. Knott, 2 G. Greene (Iowa) 582, 52 Am. Dec. 537; Connecticut Mut. Life Ins. Co. v. Smith, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; Coleman v. Dalton, 71 Mo. App. 14; Wilson v. Lowry (Ariz.) 52 Pac. 777; Robinson v. Howard, 5 Cal. 428; Terry v. Hammonds, 47 Cal. 32; State v. Moss, 13 Wash. 42, 43 Pac. 373.

parties or those in privity with them. Second, that if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant or his privies any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration; for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless. . . . . But it is equally well settled that if the plaintiff fails on demurrer in his first action for the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action."[181] We may cite a few cases in illustration of the practical working of these rules. Where a demurrer challenges the validity of the contract which forms the basis of the plaintiff's claim, and is sustained, it is a bar to a subsequent action on the contract.[182] So a decree dismissing a bill on demurrer, on the ground of lapse of time or laches, is on the merits and will bar another suit upon the same cause.[183] So an order of court in these words, "Upon motion of defendant's counsel, ordered that this cause be dismissed upon the ground that the allegations in the petition do not make a case upon which the plaintiffs can recover," is held to be a judgment upon demurrer to the declaration, and operates as a complete bar to a second suit for the same cause of action.[184] But on the other hand, where the declaration in the second suit, by reason of new averments, is not objectionable to the demurrer in the first, the issue is changed and the latter suit is not barred.[185] It matters not to which of the

[181] Gould v. Evansville & C. R. Co., 91 U. S. 526, 23 L. Ed. 416.

[182] Robinson v. Howard, 5 Cal. 428.

[183] Parkes v. Clift, 9 Lea (Tenn.) 524.

[184] Kimbro v. Virginia & T. A. L. R. Co., 56 Ga. 185.

[185] Spicer v. United States, 5 Ct. Cl. 34; Post v. Pearson, 108 U. S. 418, 2 Sup. Ct. 799, 27 L. Ed. 774; Whaley v. Lawton, 57 S. C. 198, 35 S. E. 741; Alabama & V. Ry. Co. v. McCerrin, 75 Miss. 687, 23 South. 876; Connor v. Colson, 13 S. D. 550, 83 N. W. 588.

pleadings the demurrer is interposed, or which of the parties demurs; the rules are the same. Thus a judgment on demurrer to an answer setting up a good defense, given in favor of the party pleading it, is a bar to a subsequent suit upon the same claim.[186] But in order to have this conclusive effect, it is necessary that a judgment should have been rendered upon the decision of the demurrer. Where the court has announced a decision sustaining a demurrer, which in effect defeats the plaintiff's action, and the entry of demurrer sustained has been made on the docket, but has not been followed by formal judgment for the defendant, the plaintiff may dismiss or discontinue his suit, and bring another on the same cause of action.[187] The same general principles apply in equity as well as at law. A decree dismissing a bill in chancery, rendered on a demurrer which embraces the whole merits of the case, will support a plea of res judicata.[188] But where it amounts merely to a decision that the complainant has not shown facts entitling him to relief, and not to a decree upon the merits, it is no bar to a subsequent proceeding upon the same cause of action.[189]

[186] Wilson v. Ray, 24 Ind. 156; Bissell v. Spring Valley Tp., 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411.

[187] State v. Staylor, 70 Md. 472, 17 Atl. 392; Scherff v. Missouri Pac. Ry. Co., 81 Tex. 471, 17 S. W. 39, 26 Am. St. Rep. 828; Harrison v. Hartford Fire Ins. Co. (Iowa) 80 N. W. 309; Sivers v. Sivers, 97 Cal. 518, 32 Pac. 571. So, where a petition is heard on demurrer, an order by the judge that it would be dismissed unless amended within a given time is not final on the merits, but the whole petition is open for amendment within the time limited; and a demurrer to the petition as amended opens the merits of the pleadings for a fresh adjudication. Folsom v. Howell, 94 Ga. 112, 21 S. E. 136. But under a statute (Code Iowa 1873, § 2654) providing that, on the decision of a demurrer, if the unsuccessful party fails to amend or plead over, the same consequences shall ensue as though a verdict had passed against plaintiff, or defendant had made default, it was held that, where the plaintiff failed to amend his petition, to which a demurrer had been sustained, but appealed to the supreme court, where the judgment was affirmed, such judgment constituted a final adjudication, which would bar another action for the same cause. Gregory v. Woodworth, 107 Iowa, 151, 77 N. W. 837.

[188] City Bank of New Orleans v. Walden, 1 La. Ann. 46.

[189] Detrick v. Sharrar, 95 Pa. 521.

§ 708. General Demurrer to Declaration.

From a consideration of the authorities cited in the preceding section, we are prepared to find that a judgment sustaining a general demurrer to the declaration is a bar to a new suit upon the same state of facts. And so the cases hold. "A general demurrer admits the facts alleged in the petition, and there is no good reason why a final judgment sustaining it should not be as conclusive of the same cause of action as if the plaintiff had proved these facts, and a judgment had been then rendered against him."[190] Still it is held that a judgment on general demurrer to the complaint leaves the plaintiff at liberty to present his complaint in another action so amended in form or in substance as to be no longer open to the attack made in the former suit, and such a judgment cannot be pleaded in bar to a good complaint for the same cause of action.[191]

§ 709. Demurrer to Cause of Action Stated.

In many of the states, especially those following the code practice, a statutory and much used ground of demurrer is "that the complaint does not state facts sufficient to constitute a cause of action." A decision upon a demurrer of this kind is an adjudication upon the merits, so far as the complaint goes, and is final and conclusive. In the language of the United States supreme court, "a demurrer to a complaint because it does not state facts sufficient to constitute a

[190] Bomar v. Parker, 68 Tex. 435, 4 S. W. 599; Perkins v. Moore, 16 Ala. 17; Brown v. Kirkbride, 19 Kan. 588; Carlin v. Brackett, 38 Minn. 307, 37 N. W. 342; Oregonian R. Co. v. Oregon R. & Nav. Co. (C. C.) 27 Fed. 277. In the case last cited, it was said by Deady, J.: "On a demurrer to a complaint, every material matter well pleaded therein is confessed, and if judgment is given thereon, the same is as conclusive and binding on the parties to the action as though it was given on an issue arising on a denial of the allegations of the complaint; and if a final judgment is given for the plaintiff, on a demurrer to the answer, such judgment is a conclusive determination between the parties of the questions involved in the defense made by such answer, and of the truth of the material allegations in the complaint, and may be pleaded as an estoppel in any other action between them."

[191] City of Los Angeles v. Mellus, 59 Cal. 444; Gilman v. Rives, 10 Pet. 298, 9 L. Ed. 432; Wilbur v. Gilmore, 21 Pick. (Mass.) 250; State v. Roth, 47 Ark. 222, 1 S. W. 98.

cause of action is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint, on its merits, unless leave to amend or plead over is granted. The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action."[192] Still, there are numerous cases which hold that a decision on a demurrer, interposed on this ground, will not bar a suit on a new declaration which contains the averments for want of which the former complaint was held not to state a cause of action.[193] The position taken by these cases was explained by the court in Kentucky, in a case wherein it was said of a former adjudication of that sort, "that judgment merely pronounced the former petition insufficient. It decided that the case presented by that petition was without merit, and to that extent only can it be said to have been a decision upon the merits. But the facts set out in the subsequent case have never been litigated or passed upon in any way, and it is therefore illogical and an abuse of terms to say that the judgment relied upon is a judgment upon the merits of the present case, and

[192] Alley v. Nott, 111 U. S. 472, 4 Sup. Ct. 495, 28 L. Ed. 491. See, to the same effect, Messinger v. New England Mut. Life Ins. Co. (C. C.) 59 Fed. 416; Lindsley v. Union Silver Star Min. Co. (C. C.) 106 Fed. 468; Brennan v. Berlin Iron-Bridge Co., 71 Conn. 479, 42 Atl. 625; Baker v. Frellsen, 32 La. Ann. 822; Porter v. Fraleigh, 19 Ind. App. 562, 49 N. E. 863; Lamb v. McConkey, 76 Iowa, 47, 40 N. W. 77; City of Los Angeles v. Mellus, 58 Cal. 16; Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906; Plant v. Carpenter, 19 Wash. 621, 53 Pac. 1107.

[193] Gould v. Evansville & C. R. Co., 91 U. S. 526, 23 L. Ed. 416; Gilman v. Rives, 10 Pet. 298, 9 L. Ed. 432; Gilmer v. Morris (C. C.) 46 Fed. 333; City of North Muskegon v. Clark, 22 U. S. App. 522, 10 C. C. A. 591, 62 Fed. 694; Stowell v. Chamberlain, 3 Thomp. & C. (N. Y.) 374; Grotenkemper v. Carver, 4 Lea (Tenn.) 375; McClung v. Hohl (Kan. App.) 61 Pac. 507; Moore v. Dunn, 41 Ohio St. 62; Gerrish v. Pratt, 6 Minn. 53 (Gil. 14); Wells v. Moore, 49 Mo. 229; Swanson v. Great Northern Ry. Co., 73 Minn. 103, 75 N. W. 1033; Taylor v. Matteson, 86 Wis. 113, 56 N. W. 829; Gallup v. Lichter, 4 Colo. App. 296, 35 Pac. 985; Wilson v. Lowry (Ariz.) 52 Pac. 777.

for that reason must operate as a bar to any relief."[194] But if the decision was on account of some inherent vice or defect in the case shown by the complaint, rather than for any lack of proper allegations, it is difficult to resist the conclusion that the judgment would be a complete bar to any further suit upon the same transaction or state of facts.[195] Where a demurrer to a complaint, interposed on the ground that it does not state facts sufficient to constitute a cause of action, is overruled with leave to answer, the plaintiff's right to maintain the action is not res judicata, but defendant, by answering, withdraws the demurrer, and may raise any objections to the maintenance of the action which he did not waive by answering.[196]

§ 710. Demurrer Based on Several Grounds.

When the record shows that a demurrer presented two grounds of objection to the petition, and was sustained, but without stating upon which ground, and such record is offered in bar of a subsequent action on the same cause, it will be presumed that the decision of the court was based upon that ground which would be fatal to the action, that is, necessarily compel the plaintiff to abandon it. Where one of the grounds of demurrer was a misjoinder of parties, and the other involved the merits, or the right of the plaintiff to recover on his cause of action, it will be presumed that the court sustained it upon the former ground alone. For it is natural to suppose that if the court saw an objection to the action sufficient to necessitate its dismissal, it would not after that proceed to an investigation of the merits.[197]

[194] Birch v. Funk, 2 Metc. 544.

[195] In the case of Haug v. Great Northern Ry. Co., 42 C. C. A. 167, 102 Fed. 74, it is said that, where an action is dismissed on motion of defendant because the complaint fails to state facts sufficient to constitute a cause of action, plaintiff cannot afterwards maintain an action to enforce the same right, where the legal effect of the complaint in the two cases is identical, and all evidence going to the merits of the action which would have been competent under the one would likewise be competent under the other.

[196] McCullough v. Pence, 85 Hun, 271, 32 N. Y. Supp. 986.

[197] Griffin v. Seymour, 15 Iowa, 30, 83 Am. Dec. 396; Bissell v. Spring Valley Tp., 124 U. S. 232, 8 Sup. Ct. 495, 31 L. Ed. 411. See Merrill v. Board of Com'rs of Ness County, 7 Kan. App. 717, 52 Pac. 109. Compare People v. Stephens, 51 How. Prac. (N. Y.) 235.

§ 711. Demurrer to Bill for Want of Equity.

Where a demurrer is filed to a bill for want of equity, and is overruled, the decision thereon is conclusive until properly reviewed and reversed: "The equity of the bill was thus res judicata in the cause, and could not be disputed, if the facts alleged in it were proved on the hearing." [198]

§ 712. Demurrer to Evidence.

On a demurrer to the evidence, a judgment in favor of the demurrant is a bar to any future suit on the same cause of action. "The only difference between a special verdict and a demurrer to evidence is, that the one admits every allowable deduction from the facts, the other ascertains and reports the opinion of the jury on the same facts. The judgment of the court against the plaintiff is as conclusive in the one case as in the other. If, in the one case, the plaintiff, instead of suffering a nonsuit, permits a verdict to be found, a judgment against him on the verdict will, until reversed, bar his action; so in the other case, if he submits the decision on the facts to the court, a judgment against him is equally conclusive. And in either case, he can reserve the chance of another suit on the same cause of action in no other way than by waiving his evidence [taking nonsuit] and thus evading a trial." [199]

§ 713. Dismissal for Want of Jurisdiction.

Where an action is dismissed on the sole ground that the court has no jurisdiction of the subject-matter of the suit, or of the parties, this is of course no adjudication of the merits and no bar to another action for the same cause.[200] Thus the dismissal of an action by a

[198] Kilpatrick v. Strozier, 67 Ga. 247. See infra, § 720.

[199] Hunt v. Terril's Heirs, 7 J. J Marsh. (Ky.) 67, per Robertson, C. J. See, also, Seckler v. Delfs, 25 Kan. 159.

[200] Walden v. Bodley, 14 Pet. 156, 10 L. Ed. 398; Hughes v. United States, 4 Wall. 232, 18 L. Ed. 303; Smith v. McNeal, 109 U. S. 426, 3 Sup. Ct. 319, 27 L. Ed. 986; Bunker Hill & Sullivan Mining & Concentrating Co. v. Shoshone Min. Co., 47 C. C. A. 200, 109 Fed. 504; United States v. Rand, 5 U. S. App. 230, 3 C. C. A. 556, 53 Fed. 348; Gilmer v. City of Grand Rapids (C. C.) 16 Fed. 708; Weigley v. Coffman, 144 Pa. 489, 22 Atl. 919, 27 Am. St. Rep.

federal court on the ground that jurisdiction of the defendant, a nonresident, had not been acquired, no attachment of his property being disclosed by the record, is not a bar to an action in the state court, commenced by attachment, for the same cause of action.[201] So, the disallowance, by a district court or the court of claims, of a claim against the United States, for supposed want of jurisdiction to pass upon the merits, is no bar to a subsequent petition for the allowance of the claim, after a determination that the court has jurisdiction.[202] So again, in an action of right to recover the possession of real estate, brought by the party holding the legal title, the defendant set up a defense impeaching the patent under which the plaintiff claimed, and the court decided against the defendant, on the ground that his defense was equitable merely, and could not be set up against the legal title in that action. Subsequently the defendant brought a suit in chancery to set aside the patent of the former plaintiff on the ground of fraud. It was held that the judgment in the former suit was not an adjudication of the validity of the patent.[203] A judgment of a justice (who is required to transfer to another court any cause before him so soon as it appears to involve the question of title to lands) does not operate as a bar to a subsequent suit upon a cause of action involving title, merely because such cause of action might have been introduced before the justice, in which case it would have become his duty to certify the cause to another court for trial.[204] Although a court of law declines to determine a question of set-off,

667; Champlin v. Smith, 164 Pa. 481, 30 Atl. 447; Town of Jericho v. Town of Underhill, 67 Vt. 85, 30 Atl. 690; Seitz v. McKenzie, 4 Tex. Civ. App. 81, 22 S. W. 104; Bitzer v. O'Bryan (Ky.) 54 S. W. 951; Gist v. Davis, 2 Hill, Eq. (S. C.) 335, 29 Am. Dec. 89; Smith v. Adams, 24 Wend. (N. Y.) 585; Lamaster v. Lair, 1 Dana (Ky.) 109; Waddle v. Ishe, 12 Ala. 308; Mosby v. Wall, 23 Miss. 81, 55 Am. Dec. 71; Schindel v. Suman, 13 Md. 310; Cauhape v. Parke, 46 Hun (N. Y.) 306; Roberts v. Hamilton, 56 Iowa, 683, 10 N. W. 236.

[201] Weyand v. Atchison, T. & S. F. R. Co., 75 Iowa, 573, 39 N. W. 899, 1 L. R. A. 650, 9 Am. St. Rep. 504.

[202] United States v. Rand, 5 U. S. App. 230, 3 C. C. A. 556, 53 Fed. 348; Green v. United States, 18 Ct. Cl. 93.

[203] Arnold v. Grimes, 2 Iowa, 1. See, also, Reynolds v. Lincoln, 71 Cal. 183, 12 Pac. 449.

[204] Goenen v. Schroeder, 18 Minn. 68 (Gil. 51).

yet this is not res judicata so as to preclude an inquiry in a court of equity having concurrent jurisdiction of the matter.[205]

§ 714. Dismissal of Action Prematurely Brought.

The dismissal of a suit, or judgment for the defendant, on the ground that it was prematurely brought, the cause of action not having yet accrued, is universally held to be no bar to another action on the same demand after time has removed the objection.[206] It is no adjudication of the merits; the most it decides is that the claim or demand was not then due or matured.[207] For example, if the vendor of goods sold upon a credit sues before the purchase-money is due, and for that reason fails upon a trial under the general issue, the judgment is no bar to a subsequent suit brought after the purchase-money becomes due.[208] So where a purchaser of land sued to recover back the purchase-money before he had been evicted, and for that reason was defeated, the judgment in that action will not bar a subsequent suit brought for the same object after eviction.[209] A judgment rendered for the defendant in a suit on a

[205] Hackett v. Connett, 2 Edw. Ch. (N. Y.) 73.

[206] Clark v. Young, 1 Cranch, 181, 2 L. Ed. 74; New England Bank v. Lewis, 8 Pick. (Mass.) 113; Jepson v. International Fraternal Alliance, 17 R. I. 471, 23 Atl. 15; Slocum v. Wilbour (R. I.) 49 Atl. 489; Moloney v. Nelson, 158 N. Y. 351, 53 N. E. 31; Wilcox v. Lee, 1 Rob. (N. Y.) 355; Quackenbush v. Ehle, 5 Barb. (N. Y.) 469; Ezzell v. Maltbie, 6 Ga. 495; Hurst v. Means, 2 Sneed (Tenn.) 546; McCelvy v. Noble, 13 Rich. Law (S. C.) 330; Estill v. Taul, 2 Yerg. (Tenn.) 466, 24 Am. Dec. 498; Pasley v. McConnell, 40 La. Ann. 609, 4 South. 501; Seaton v. Hixon, 35 Kan. 663, 12 Pac. 22; Chicago & E. I. R. Co. v. State, 153 Ind. 134, 51 N. E. 924; Kirkpatrick v. Stingley, 2 Ind. 269; Brackett v. People, 115 Ill. 29, 3 N. E. 723; Bacon v. Schepflin, 185 Ill. 122, 56 N. E. 1123; Rivers v. Rivers, 65 Iowa, 568, 22 N. W. 679; Dillinger v. Kelley, 84 Mo. 561; Shanklin v. Francis, 67 Mo. App. 457; McNees v. Southern Ins. Co., 69 Mo. App. 232; Gassert v. Black, 18 Mont. 35, 44 Pac. 401; Hart v. Bank of Commerce, 51 Neb. 486, 71 N. W. 40; McFarlane v. Cushman, 21 Wis. 401; Gray v. Dougherty, 25 Cal. 266.

[207] But such a judgment finally and conclusively settles the point that the action was prematurely brought; this question cannot be relitigated in a new action. Wilhelmi v. Des Moines Ins. Co. (Iowa) 68 N. W. 782.

[208] New England Bank v. Lewis, 8 Pick. (Mass.) 113; Kirkpatrick v. Stingley, 2 Ind. 273.

[209] Hurst v. Means, 2 Sneed (Tenn.) 546. And see Rose v. City of Yonkers, 133 N. Y. 315, 31 N. E. 236.

promissory note, because the action was brought before the note was due, is not a bar to an action on the note after its maturity.[210] And so, where a bill in equity, brought by a general creditor of an insolvent debtor, is dismissed on the ground that it cannot be maintained until he has obtained a judgment at law on his debt, the decree dismissing the bill is no bar to an action at law on the debt.[211] A judgment for the defendant in an action upon a guaranty of a promissory note, which recites the ground upon which it is based to be that the cause of action has not yet accrued, because the plaintiff has not exhausted his legal remedy against the maker of the note, does not constitute an adjudication upon the validity of the guaranty which can be pleaded in bar of another action thereon after execution against the maker has been returned unsatisfied.[212] So a judgment in favor of the indorser of a note, on a verdict which was rendered on the ground that the action had been brought before notice was given to him, is no bar to another action commenced after the giving of notice.[213] Where a former action failed as to one part of the plaintiff's demand, because prematurely brought, the judgment is no bar to a subsequent action by the same plaintiff on that part of the demand, after the same has matured.[214] And although there may have been a general verdict for the plaintiff, yet he may show that the subject-matter of his second suit, which was included in the former action and presented to the court or jury, was disallowed because not yet due or matured.[215] The same prin-

[210] Farber v. National Forge & Iron Co., 50 Ill. App. 503; Hewett v. Williams, 48 La. Ann. 686, 19 South. 604; Hardin v. Dickey, 123 Cal. 513, 56 Pac. 258. Judgment for defendant in an action on a note, on the ground of a failure to make a deed as agreed, is not a bar to an action on the note, after such consideration is supplied. Whitlock v. Appleby, 49 Mo. App. 295. The dismissal of an action to recover for usury charged plaintiff by defendant, on the ground that the action could not be maintained until the usurious interest had been paid, is no bar to an action brought after payment has been made. Anderson v. Trimble (Ky.) 37 S. W. 71.

[211] Maxwell v. Clarke, 130 Mass. 112, 29 N. E. 224.

[212] Boyer v. Austin, 54 Iowa, 402, 6 N. W. 585; McCelvy v. Noble, 13 Rich. Law (S. C.) 330.

[213] New England Bank v. Lewis, 8 Pick. (Mass.) 113. See, also, Tracy v. Merrill, 103 Mass. 280.

[214] Oleson v. Merrihew, 45 Wis. 397.

[215] Kane v. Fisher, 2 Watts (Pa.) 246.

ciples govern the case of a claim or demand presented by way of set-off, instead of being made the basis of a suit. Thus, where, in an action before a justice, the answer contained an alleged set-off, and the justice, in rendering judgment in the action, refused to consider or allow the demand, upon the ground that it was not due at the commencement of the action, and therefore not a legitimate set-off, it was held that in a subsequent action brought to recover the amount of the set-off the former judgment was no bar.[216]

§ 715. Dismissal of Misconceived Action.

A judgment given against the plaintiff on the single ground that he has mistaken his remedy or form of action, is no bar to his subsequent suit brought in the proper form.[217] "A bar in a wrong action brought is not any bar when a right action is brought; as where one delivers goods to keep, and brings trespass against the bailiff for these goods, and is barred by verdict or demurrer, that shall not be a bar unto him in bringing detinue or accompt."[218] So when goods, taken from their owner by a sheriff on an execution against another person, have been replevied by the owner, and the sheriff has recovered judgment for their value, in the replevin suit, on the ground that replevin was not the legal remedy for such a case, the owner may then recover their value from the sheriff in trover.[219] So also, the fact that mortgage creditors brought replevin for mortgaged chattels which had been taken under execution, and that judgment was rendered against them, under a statute which forbade such an action in such a case and provided a remedy by

[216] Krapp v. Eldridge, 33 Kan. 106, 5 Pac. 372; Crabtree v. Welles, 19 Ill. 55.

[217] Ferrers v. Arden, 2 Cro. Eliz. 668; Hitchin v. Campbell, 2 Wm. Bl. 779; Wiggins Ferry Co. v. Ohio & M. Ry. Co., 142 U. S. 396, 12 Sup. Ct. 188; Meredith Mechanic Ass'n v. American Twist-Drill Co., 67 N. H. 450, 39 Atl. 330; Steinson v. Board of Education of City of New York, 49 App. Div. 143, 63 N. Y. Supp. 128; Massey v. McCoy, 79 Mo. App. 169; Wyman v. Dorr, 3 Me. 185; Walker v. Davis, 1 Gray (Mass.) 506; Livermore v. Herschell, 3 Pick. (Mass.) 33; Sager v. Blain, 44 N. Y. 445; Foster v. Wells, 4 Tex. 101; City of Oakland v. Oakland Water-Front Co., 118 Cal. 160, 50 Pac. 277; 5 Bac. Abr. 440, "Pleas," 1, 13; 1 Smith, Lead. Cas. 673.

[218] Ferrers v. Arden, 2 Cro. Eliz. 668.

[219] Kittredge v. Holt, 58 N. H. 191.

"claimant's issue," does not preclude them from thereafter maintaining a bill to foreclose.[220] Where one holding an estate in lands brings an action for partition against those claiming adversely, such person is not thereby precluded, by the dismissal of his bill, from bringing ejectment against the same persons for the same estate.[221] So again, where a party, mistaking his remedy, attempts to enforce a claim by presenting it as a set-off, but against a wrong party and in a suit where it is not and cannot be available, this does not debar him from afterwards suing the right person on such claim.[222]

§ 716. Dismissal on Technical Grounds.

In general, a judgment dismissing a suit on account of any technical defect, irregularity, or informality, is not on the merits and therefore no bar to a subsequent suit.[223] Thus, in an action against a sheriff for the default of his deputy, judgment was for the defendant, on the ground of a variance between the notice and the receipts of the officer in the description of the claims. It was held that the judgment would not bar a subsequent proceeding against the deputy.[224] So the dismissal of an action of replevin for informality in the replevin bond,[225] or because the plaintiff failed to make and prove a lawful demand,[226] or on account of a defect in the affidavit,[227] is not on the merits and no bar to a new suit. So again, the dismissal of a suit for failure to file security for costs is not a bar to another suit brought afterwards on the same cause of action.[228]

[220] Conn v. Bernheimer, 67 Miss. 498, 7 South. 345.

[221] Bigley v. Jones, 114 Pa. 510, 7 Atl. 54.

[222] Bertrand v. Bingham's Adm'x, 13 Tex. 266. See, also, Watson v. Cowdrey, 23 Hun (N. Y.) 169.

[223] See Ryan v. Seaboard & R. R. Co. (C. C.) 89 Fed. 397; Rose v. Hawley, 141 N. Y. 366, 36 N. E. 335; Kern v. Wilson, 82 Iowa, 407, 48 N. W. 919.

[224] Witcher v. Oldham, 4 Sneed (Tenn.) 220. See Crosby v. Baker, 6 Allen (Mass.) 295.

[225] Morton v. Sweetser, 12 Allen (Mass.) 134; Walbridge v. Shaw, 7 Cush. (Mass.) 560.

[226] Roberts v. Norris, 67 Ind. 386.

[227] Stockwell v. Byrne, 22 Ind. 6.

[228] Dean v. Ridgway (Miss.) 6 South. 236; Rosenthal v. McMann, 93 Cal 505, 29 Pac. 121.

And so if a suit is dismissed on account of a failure of the plaintiff to submit himself to examination.[229]

§ 717. Failure of Evidence.

It is held that where an action is defeated because, in an incidental matter, not affecting the merits of the controversy, the case made by the plaintiff is defective, the judgment is not a bar to another action for the same cause.[230] And even, as it appears, a judgment dismissing a complaint for failure of evidence to sustain one of its material allegations, is no more in effect than a judgment of nonsuit, which will not support a plea of res judicata.[231] In a case in Pennsylvania, it was shown that a tenant had received due notice to quit at the end of his term, and proceedings were commenced by the landlord before a justice to obtain possession, but the justice dismissed the proceedings on the ground that the landlord had extended the term. In ejectment by the latter for the same premises, it was held that these proceedings, being merely a finding that the complaint was not sustained by sufficient evidence, and not a judgment for the defendant, could not prevent a recovery in a subsequent ejectment on a good title.[232]

§ 718. Defects in the Pleadings.

In accordance with the general principles we have been considering, it is well settled that a judgment rendered on the ground of formal defects in the pleadings does not touch the merits of the controversy and is no bar to a second action.[233] Or, as stated in an

[229] Cheney v. Stone (C. C.) 29 Fed. 885.

[230] Brackett v. Hoitt, 20 N. H. 257; Converse v. Sickles, 146 N. Y. 200, 40 N. E. 777, 48 Am. St. Rep. 790; In re Townshend, 64 Hun, 636, 18 N. Y. Supp. 905.

[231] Whaley v. Stevens, 24 S. C. 479; Alabama G. S. Ry. Co. v. Blivens, 92 Ga. 522, 17 S. E. 836; White v. Whiting, 8 Daly (N. Y.) 23. Compare Chiles v. Champenois, 69 Miss. 603, 13 South. 840; Morgan v. Chicago, M. & St. P. Ry. Co., 83 Wis. 348, 53 N. W. 741.

[232] McLaughlin v. McGee, 79 Pa. 217.

[233] Lampen v. Kedgewin, 1 Mod. 207; City of North Muskegon v. Clark, 10 C. C. A. 591, 62 Fed. 694; Soper v. Manning, 158 Mass. 381, 33 N. E. 516; Kendal v. Talbot, 1 A. K. Marsh. (Ky.) 321; Fuher v. Villwock, 14 Ohio Cir.

early case, a former judgment is no bar if it was given upon the manner of pleading in the action rather than upon the matter of the plea.[234] This rule applies as well to collateral or interlocutory decisions as to final judgments dismissing the suit. Thus, a motion having been denied for irregularity in the papers on which it was founded, a new motion, regularly made, for the same purpose, is not barred, although no formal leave to renew be obtained.[235] And the same rule governs the case of similar adjudications in equity. Where a bill is dismissed on demurrer, merely in consequence of the omission of an essential allegation, which is supplied in a second suit, the dismissal cannot be considered as on the merits, and hence the second action is not barred.[236] So a decree, under a rule in equity, dismissing the complainant's bill because of his failure to reply to a plea or set it down for argument, is not conclusive, because not on the merits.[237] It is to be observed, however, that a judgment is not the less conclusive because the matter settled thereby was improperly pleaded, if no objection was made at the time, and provided such matter was not beyond the jurisdiction. Thus, where matter is improperly pleaded as a set-off, but timely objection is not taken, such matter becomes res judicata upon the rendition of judgment.[238]

§ 719. Dismissal for Defect or Want of Parties.

A verdict and judgment for the defendant, or an order dismissing the suit, rendered solely on the ground of a misjoinder, non-joinder, or defect of parties, or because the plaintiff is not the proper party to sue, can have no greater effect than to terminate that particular action; it does not affect the merits and will not bar a subsequent suit

Ct. R. 389; Elkhart Car-Works Co. v. Ellis, 135 Ind. 205, 34 N. E. 11; Chicago, M. & St. P. Ry. Co. v. Hoyt, 50 Ill. App. 583; Hoyt v. Chicago, M. & St. P. Ry. Co., 177 Ill. 617, 52 N. E. 1127; Smalley v. Edey, 19 Ill. 207; Wells v. Moore, 49 Mo. 229; State v. Cornell, 52 Neb. 25, 71 N. W. 961; Naftzger v. Gregg (Cal.) 31 Pac. 612; O'Hara v. Parker, 27 Or. 156, 39 Pac. 1004.

[234] Ingram v. Bray, 2 Lev. 210.

[235] Corwith v. State Bank of Illinois, 15 Wis. 289.

[236] Gilmer v. Morris (C. C.) 30 Fed. 476.

[237] Keller v. Stolzenbach (C. C.) 20 Fed. 47.

[238] Thompson v. Wineland, 11 Mo. 243.

on the same cause.[239] For example, where a party dealing with an agent brings suit against agent and principals jointly, and in consequence of a misnomer of the principals fails to secure a valid judgment against them, he is not thereby estopped from bringing a second action against such principals.[240] So where it affirmatively appears on the face of the record, in an action against several parties in which different matters of relief are sought, that the court dismissed the plaintiff's claim for relief in respect to one of such matters on the ground that, as it affected only one of the defendants, it was not determinable in that action, the plaintiff will not thereby be precluded from obtaining such relief in a subsequent action, although the order of dismissal was not in terms stated to be without prejudice.[241] To take another illustration,—in an action upon a marine policy, the defendants insisted that the action was brought in the wrong name and that the plaintiff had not proved his interest in the policy. The judge instructed the jury to find a verdict for the defendants on the latter point, which they did. The court in banc sustained both points, and judgment was entered for the defendants. It was held that this adjudication was no bar to a subsequent suit properly brought.[242] In equity, however, the rule is somewhat different. While it is error to dismiss a bill absolutely for want of sufficient parties defendant, and the decree ought to reserve the complainant's rights, and he can procure its reversal on appeal, yet if he fails to do so, it is as conclusive against him as a decree on the merits.[243] The rule first above given applies not only to the case of a misjoinder or nonjoinder of parties, but also where the successful contention of

[239] St. Romes v. Levee Cotton Press Co., 127 U. S. 614, 8 Sup. Ct. 1335, 32 L. Ed. 289; Vaughan v. O'Brien, 57 Barb. (N. Y.) 491; Robbins v. Wells, 1 Rob. (N. Y.) 666; Wheeler v. Ruckman, 7 Rob. (N. Y.) 447; Fleming v. Insurance Co., 12 Pa. 391; Nickelsen v. Ingram, 24 Tex. 630; Miller v. Langworthy, 3 G. Greene (Iowa) 347; McCall v. Jones, 72 Ala. 368; Weinberger v. Merchants' Mut. Ins. Co., 41 La. Ann. 31, 5 South. 728; Union Terminal R. Co. v. Board of Railroad Com'rs, 54 Kan. 352, 38 Pac. 290; Baker v. Lane, 137 Mo. 682, 39 S. W. 450; Union Pac. Ry. Co. v. Kelley, 4 Colo. App. 325, 35 Pac. 923.

[240] Tierney v. Abbott, 46 Wis. 329, 1 N. W. 94.

[241] Smith v. Auld, 31 Kan. 262, 1 Pac. 626.

[242] Fleming v. Insurance Co., 12 Pa. 391.

[243] Thompson v. Clay, 3 T. B. Mon. (Ky.) 359, 16 Am. Dec. 108.

the defendant is that the plaintiff has not legal capacity to sue.[244] Thus, where an assignee of a mortgage fails in a suit brought to foreclose the same from a defect in the assignment, the judgment of dismissal is no bar to another action brought by him for the same purpose after he has perfected his assignment.[245] A judgment dismissing a supplemental complaint, filed by the representative of a plaintiff who has died since the filing of the original complaint, given solely upon the ground that such representative has no legal capacity to sue, is not a bar to further proceedings by the proper person.[246]

On similar principles, it is held that a judgment of a United States court dismissing a bill because brought by a married woman in her own name, and for want of jurisdiction, is not a bar to an action in a state court between the same parties for the same cause of action.[247] And the fact that a highway commissioner, whose duty it was to bring an action to recover the cost of repairing a highway, by mistake brought it in his own name as such officer, does not bar or estop him from thereafter bringing the action in the name of the municipal corporation.[248]

§ 720. Dismissal of Bill in Equity.

It is a well established rule that a final decree in chancery regularly dismissing a bill on the merits, when the matters of the bill have been passed upon, and without any reservation of the complainant's right to sue thereafter, is a bar to any new bill between the same parties upon the same matter.[249] In the language of the

[244] Cunningham v. City of Cleveland, 39 C. C. A. 211, 98 Fed. 657; White v. Savery, 50 Iowa, 515; Cook v. Doremus, 10 La. Ann. 679; Rodgers v. Levy, 36 Neb. 601, 54 N. W. 1080.

[245] Mitchell v. Cook, 29 Barb. (N. Y.) 243. See, also, Miller v. Langworthy, 3 G. Greene (Iowa) 347.

[246] Robbins v. Wells, 1 Rob. (N. Y.) 666.

[247] Wills v. Pauly, 116 Cal. 575, 48 Pac. 709.

[248] Town of Clay v. Hart, 25 Misc. Rep. 110, 55 N. Y. Supp. 43.

[249] Durant v. Essex Co., 7 Wall. 107, 19 L. Ed. 154; Doe ex dem. Parrish v. Ferris, 2 Black, 606, 17 L. Ed. 317; Case v. Beauregard, 101 U. S. 688, 25 L. Ed. 1004; Albright v. Oyster, 140 U. S. 493, 11 Sup. Ct. 916, 35 L. Ed. 534; Baker v. Cummings, 181 U. S. 117, 21 Sup. Ct. 578, 45 L. Ed. 776; Pelton v. Mott, 11 Vt. 148, 34 Am. Dec. 678; Lewis v. Lewis, 106 Mass. 309; Blackinton v. Blackinton, 113 Mass. 231; Bradley v. Bradley, 160 Mass. 258, 35 N. E. 482;

supreme court of Alabama: "The decree of a court of chancery, dismissing a bill absolutely and unconditionally, on a hearing on pleadings and evidence, is an adjudication of the merits of the controversy, forming a bar to any future litigation of the same matters between the parties or their privies. A decree of that kind, not made because of insufficient pleading, or for want of jurisdiction, or for some cause not touching the merits, if not intended to be final and conclusive, is accompanied with words of qualification, with some appropriate terms, indicating that it is not intended to preclude future suit, such as that the dismissal is 'without prejudice.' If the case is of that character that such a reservation ought to be made, and it is omitted, on appeal the error will be corrected. . . . . When, however, the decree of dismissal is unqualified, it is presumed to be an adjudication on the merits adversely to the complainant, and constitutes a bar to further litigation of the same matters between the parties."[250] Thus a final decree that "the cause being submitted to the court upon bill, answer, and replication, and having been duly considered, the court finds, adjudges, and decrees that the equities are with the defendant," and dismissing the bill, is an adjudication upon the merits and bars a second suit upon the same matters.[251] And hence when a decree has been passed by the court upon a formal hearing, dismissing the bill, a second bill, alleging facts, which, if established, would entitle the plaintiff to the same measure of relief as the facts set forth in his former bill would entitle him to, will be dismissed upon a plea in bar.[252] Decree dis-

Perine v. Dunn, 4 Johns. Ch. (N. Y.) 140; Kelsey v. Murphy, 26 Pa. 78; Evans v. Tatem, 9 Serg. & R. (Pa.) 261, 11 Am. Dec. 717; Holliday v. Coleman, 2 Munf. (Va.) 162; Taylor v. Yarbrough, 13 Grat. (Va.) 183; Watson v. Watson, 45 W. Va. 290, 31 S. E. 939; Turner v. Cates, 90 Ga. 731, 16 S. E. 971; Jenkins v. Johnston, 57 N. C. 149; Black v. Black, 27 Ga. 40; Pugh v. Holt, 27 Miss. 461; Thompson v. Clay, 3 T. B. Mon. (Ky.) 359, 16 Am. Dec. 108; Moss v. Ashbrooks, 12 Ark. 369; Wilcox v. Balger, 6 Ohio, 406; Stults v. Forst, 135 Ind. 297, 34 N. E. 1125; Armstead v. Blickman, 51 Ill. App. 470; Garrick v. Chamberlain, 97 Ill. 620; Knowlton v. Hanbury, 117 Ill. 471, 5 N. E. 581; Scully v. Chicago, B. & Q. R. Co., 46 Iowa, 528.

[250] Tankersly v. Pettis, 71 Ala. 179. See, also, Strang v. Moog, 72 Ala. 460.

[251] Lyon v. Perin & Gaff Manuf'g Co., 125 U. S. 698, 8 Sup. Ct. 1024, 31 L. Ed. 839.

[252] Jenkins v. Johnston, 57 N. C. 149; Black v. Black, 27 Ga. 40.

missing a bill on the ground that the deed under which the complainant claimed was fraudulent, is a bar to another original bill to try the validity of the same deed.[253] And so, where, in a suit in equity for specific performance of a contract to convey land, the bill was dismissed generally for non-payment of the purchase-money, the decree is a bar to a future proceeding upon the same contract.[254]

But to make a decree dismissing a bill on the merits a bar to another suit, it must be an absolute decision upon the same point or matter, and the new bill must be brought by the same plaintiff who filed the original bill, or his representatives, against the same defendant or his representatives.[255] And the decree must have been ordered upon a hearing of the parties or on the merits of the cause.[256] But when the cause has been set down for hearing after replication and an order closing the proofs, a decree dismissing the bill is a bar to a subsequent suit for the same cause between the same parties, although no proofs were in fact taken and such decree was taken by default at the hearing.[257] And such a decree is none the less a bar because the record shows that it was passed by a divided court.[258] And the dismissal of a bill by a federal court, appearing by the record to have been ordered upon the merits, is a bar to a subsequent action in a state court, although the plaintiff's attorneys in the federal court had withdrawn their appearance.[259] A decree in terms dismissing an amended bill for want of equity, dismisses the original bill as amended, and such decree is therefore conclusive as to the claim made by the plaintiff in the original bill.[260]

Before leaving the subject it is necessary to call the reader's at-

[253] Holliday v. Coleman, 2 Munf. (Va.) 162.

[254] Wilcox v. Balger, 6 Ohio, 406.

[255] Neafie v. Neafie, 7 Johns. Ch. (N. Y.) 1, 11 Am. Dec. 380; Pugh v. Holt, 27 Miss. 461.

[256] Sarchet v. The General Isaac Davis, Crabbe, 185, Fed. Cas. No. 12,357; Clark v. Bernhard Mattress Co. (C. C.) 82 Fed. 339; Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368, 66 N. W. 471; Gage v. Ewing, 114 Ill. 15, 28 N. E. 379.

[257] Ogsbury v. La Farge, 2 N. Y. 113.

[258] Durant v. Essex Co., 8 Allen (Mass.) 103, 85 Am. Dec. 685.

[259] Scully v. Chicago, B. & Q. R. Co., 46 Iowa, 528.

[260] Bradish v. Grant, 119 Ill. 606, 9 N. E. 332.

tention to two matters closely connected with the rule under consideration. In the first place, where the complainant in equity is allowed to have his bill dismissed, before the hearing, upon his own motion, and upon the payment of costs, this settles nothing as to the merits of the cause, and is no bar to a second bill upon the same matters.[261] It can, in the nature of things, have no greater or higher effect than a voluntary nonsuit in an action at law. In the second place, the dismissal of a bill seeking equitable relief in respect to a cause of action or an instrument upon which the party can sue at law, is no bar to an action at law upon the same instrument, although the decree does not state the dismissal to have been without prejudice.[262] The decree does indeed determine that the plaintiff has no claim to equitable relief, but it by no means follows that he has not a good right of action at law.

§ 721. Dismissal "Without Prejudice."

Where a bill in equity is dismissed "without prejudice," the effect of the reservation is to prevent the decree from constituting a bar to another suit brought upon the same subject-matter.[263] The pur-

[261] Walden v. Bodley, 14 Pet. 160, 10 L. Ed. 398; Badger v. Badger, 1 Cliff. 241, Fed. Cas. No. 717.

[262] Beere v. Fleming, 13 Ir. C. L. 506; Cramer v. Moore, 36 Ohio St. 347; Porter v. Wagner, 36 Ohio St. 471. But compare Carberry v. West Virginia & P. R. Co., 44 W. Va. 260, 28 S. E. 694.

[263] Durant v. Essex Co., 7 Wall. 109, 19 L. Ed. 154; Shepherd v. Pepper, 133 U. S. 626, 10 Sup. Ct. 438, 33 L. Ed. 706; Northern Pac. R. Co. v. St. Paul, M. & M. R. Co. (C. C.) 47 Fed. 536; Thurston v. Thurston, 99 Mass. 39; Hazen v. Lyndonville Nat. Bank, 70 Vt. 543, 41 Atl. 1046, 67 Am. St. Rep. 680; Reynolds v. Hennessy, 17 R. I. 169, 23 Atl. 639; English v. English, 27 N. J. Eq. 579; Ballentine v. Ballentine (Pa.) 15 Atl. 859; O'Keefe v. Irvington Real-Estate Co., 87 Md. 196, 39 Atl. 428; Lang's Heirs v. Waring, 25 Ala. 625, 60 Am. Dec. 533; Nevitt v. Bacon, 32 Miss. 212, 66 Am. Dec. 609; Tucker v. Wilson, 68 Miss. 693, 9 South. 898; Epstein v. Ferst, 35 Fla. 498, 17 South. 414; Fisk v. Parker, 14 La. Ann. 491; Magill v. Mercantile Trust Co., 81 Ky. 129; Condon v. Knoxville, C. G. & L. R. Co. (Tenn. Ch. App.) 35 S. W. 781; Missouri, K. & T. Ry. Co. v. McWherter, 59 Kan. 345, 53 Pac. 135; Wanzer v. Self, 30 Ohio St. 378; Crews v. Cleghorn, 13 Ind. 438; Long v. Long, 141 Mo. 352, 44 S. W. 341; Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661; Moore v. Russell, 133 Cal. 297, 65 Pac. 624; Prondzinski v. Garbut (N. D.) 86 N. W. 969.

port of a decree so framed is that such dismissal shall not operate as a bar to a new suit which the party may institute; it does not debar the defendant of any defense which he might be entitled to make in the new suit, and confers no privilege on the complainant; and it will not have the effect of excepting from the time prescribed by the statute of limitations the time of the pendency of that suit.[264] In fact, the effect of the reservation is merely to prevent the decree from constituting a bar to another suit brought upon the same title, but it by no means compromits the court as a judicial determination in favor of that title.[265] Nor does it alter the case that the court erred, by dismissing the bill "without prejudice," when it ought to have been dismissed finally upon the merits. If the decree is absolutely void for want of authority to make such a reservation, there is no valid adjudication to stand in the way of a new suit. And if it is merely irregular or erroneous, it must be corrected on appeal, and until that is done, it must stand as rendered and cannot be impeached collaterally.[266] Conversely, if the reservation is omitted, where it ought to have been inserted, the error will be corrected in the court above.[267]

§ 722. Presumption that Merits were Considered.

It will not be presumed, from the mere fact that a bill was dismissed, that the merits were not reached. On the contrary, according to the great majority of the decisions, it must appear in specific terms on the record that the dismissal was "without prejudice," or else the decree will operate as a bar to a subsequent suit.[268] Where,

[264] Nevitt v. Bacon, 32 Miss. 212, 66 Am. Dec. 609.

[265] Lang's Heirs v. Waring, 25 Ala. 625, 60 Am. Dec. 533.

[266] Wanzer v. Self, 30 Ohio St. 378.

[267] Durant v. Essex Co., 7 Wall. 107, 19 L. Ed. 154.

[268] Durant v. Essex Co., 7 Wall. 107, 19 L. Ed. 154; Hubbell v. United States, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. Ed. 136; Equitable Trust Co. v. Smith, 23 C. C. A. 394, 77 Fed. 677; Gove v. Lyford, 44 N. H. 525; Foote v. Gibbs, 1 Gray (Mass.) 412; Thurston v. Thurston, 99 Mass. 39; Bigelow v. Winsor, 1 Gray (Mass.) 301; Borrowscale v. Tuttle, 5 Allen (Mass.) 377; Cochran v. Couper, 2 Del. Ch. (Del.) 27; Kelsey v. Murphy, 26 Pa. 78; Taylor v. Yarbrough, 13 Grat. (Va.) 183; Martin v. Evans, 85 Md. 8, 36 Atl. 258, 36 L. R. A. 218, 60 Am. St. Rep. 292; Carlisle v. Howes (Ky.) 43 S. W. 191; Curts v. Trustees of Bardstown, 6 J. J. Marsh. (Ky.) 536; Wilcox v. Balger,

upon hearing, a decree is made which contains the following recital, "And it appearing that there is no equity in complainant's bill, the same is therefore dismissed," this must be considered a decree upon the merits, even though there was a demurrer to the bill for want of jurisdiction.[269] There are a few cases, however, which have refused to recognize this rule, or have even applied an opposite rule. Thus in Chase's Case,[270] it was held that a decree dismissing a bill is no bar to a subsequent suit, unless it is shown that there was an absolute determination that the party had no title, and that the matter is res judicata. And in certain decisions of the supreme court of Ohio, a distinction is made between cases dismissed on a hearing and those put out of court before the hearing on the merits. Where the question is whether a bill was dismissed upon the merits or for want of prosecution, and the ground of dismission is not stated, and nothing is found in the record from which it might be discovered by inference, according to these authorities there is no presumption either way. The consequence of which is, that, as it must be established that the dismissal was upon the merits, and that fact cannot be presumed, there is no bar unless it is affirmatively shown. But where it appears that the dismissal was upon a hearing of the case, it is to be inferred that it was upon the merits.[271] It is further held, in that state, that where, in an action at law, a former decree in chancery, dismissing a bill generally, is relied upon as an estoppel per se as to the matters set up in the bill, and it appears from the record that the bill may well have been dismissed for want of jurisdiction, the decree will not estop the plaintiff therein from proving, in the suit at law, the matter relied on in the bill.[272]

§ 723. Dismissal for Want of Prosecution.

Where a bill in equity is dismissed, not on its merits, but because the complainant declines further prosecution of it, the decree of dis-

6 Ohio, 406; Scully v. Chicago, B. & Q. R. Co., 46 Iowa, 528; Adams v. Cameron, 40 Mich. 506; Edgar v. Buck, 65 Mich. 356, 32 N. W. 644.

[269] Williams v. Hollingsworth, 5 Lea (Tenn.) 358.

[270] 1 Bland, Ch. (Md.) 206, 17 Am. Dec. 277.

[271] Loudenback v. Collins, 4 Ohio St. 251.

[272] Lore's Lessee v. Truman, 10 Ohio St. 45.

missal is no bar to a subsequent suit founded on the same matters. The dismissal for want of prosecution has no greater effect than a nonsuit at law.[273] Thus, where a temporary injunction is issued, and the bill is subsequently dismissed for want of prosecution, the injunction cannot have the effect of res judicata, so as to bar the right to question, in any other suit in equity, the validity of the proceedings which the bill was brought to annul.[274]

§ 724. Evidence to Show Consideration of Merits.

Leaving the special topic of the dismissal of bills in equity, and returning to the general subject, we may observe that it is frequently a matter of some difficulty to determine whether a former judgment was upon the merits or not. How, then, shall this be made clear? In the first place, the record must be searched, and if necessary its different parts must be compared, for evidence to show an adjudication of the merits. Thus an order made by a court which, on its face, purports first to be a judgment on demurrer to a complaint, and then shows, by a comparison of the recitals of the order and what appears in the pleadings in the case, that it was founded on facts which accrued after the filing of the complaint and were only made to appear by the answer, and when there was no trial or admission of the truth of these facts by the plaintiff, cannot be held to be a judgment on the merits so as to bar another action.[275] But if nothing can be discovered from the record, it will be presumed (although not conclusively) that the judgment was rendered on the merits.[276] Hence, when a party to an action seeks to avoid the estoppel of a

[273] Keller v. Stolzenbach (C. C.) 20 Fed. 47; Whitaker v. Davis (C. C.) 91 Fed. 720; Rosse v. Rust, 4 Johns. Ch. (N. Y.) 300; Porges v. Cohen, 23 Misc. Rep. 703, 52 N. Y. Supp. 71; Porter v. Vaughn, 26 Vt. 624; Cornell v. Hartley, 41 W. Va. 493, 23 S. E. 789; Worst v. Sgitcovich (Tex. Civ. App.) 46 S. W. 72; Nickell v. Fallen (Ky.) 23 S. W. 366; Renshaw v. First Nat. Bank (Tenn. Ch. App.) 63 S. W. 194; Mills v. Pettigrew, 45 Kan. 573, 26 Pac. 33; Loudenback v. Collins, 4 Ohio St. 251; Laird v. Morris, 23 Nev. 34, 42 Pac. 11; Spear v. Door County, 65 Wis. 298, 27 N. W. 60; Philpott v. Brown, 16 Neb. 387, 20 N. W. 288; Pyle v. Piercy, 122 Cal. 383, 55 Pac. 141.

[274] Chamberlain v. Sutherland, 4 Ill. App. 494.

[275] Gibson v. Miln, 1 Nev. 526.

[276] National Bank of Monticello v. Bryant, 13 Bush (Ky.) 419. Compare Estep v. Larsh, 21 Ind. 190.

former judgment, by alleging that such judgment wa upon the merits, if the judgment itself is general in its does not disclose the ground upon which it was rendered is upon the party to make good his allegation, and to may introduce parol evidence.[277] But where the subje an action has been confessedly in litigation in a former party relies on the fact that the merits were not passed former action, the evidence ought to show that fact clearl to exclude all other hypotheses."[278] The testimony o of the peace by whom the judgment was rendered may to show that the cause was dismissed, and not tried o because the claim was not due at the time the suit was br

Part IV. What Causes of Action are Barr

§ 725. Causes of Action must be the Same.

When a former judgment is offered in evidence in a suit between the same parties, as conclusive upon a par or question in controversy, it is not necessary that the should be founded upon the same cause. The record wi sible, however widely the two causes of action may diff only that the special point sought to be concluded wa matter in issue in the earlier suit and was there litiga cided.[280] But when a former judgment is pleaded in ba action, the case is different. The general rule is that it available as a bar unless the cause of action alleged in suit is the same identical cause of action which was set gated in the former action.[281] An exception to this rul

[277] Dear v. Reed, 37 Hun (N. Y.) 594; Inhabitants of Embden 89 Me. 578, 36 Atl. 1101, 56 Am. St. Rep. 442; Davie v. Davis, 13 S. E. 240, 23 Am. St. Rep. 71; Haseltine v. Thrasher, 65 Munro v. Meech, 94 Mich. 596, 54 N. W. 290.

[278] Baxter v. Aubrey, 41 Mich. 13, 1 N. W. 897.

[279] Wood v. Faut, 55 Mich. 185, 20 N. W. 897.

[280] Supra, §§ 504, 506.

[281] Parr v. Village of Greenbush, 42 Hun (N. Y.) 232; McG 12 Ark. 164; Wooster v. Cooper, 59 N. J. Eq. 204, 45 Atl. 381; 47 Kan. 656, 28 Pac. 707; Weis v. Meyer, 55 Ark. 18, 17 S. W.

a necessary part of it, is that any claim or demand is barred by the former recovery which ought to have been included in the first suit, as constituting an inseparable part of the plaintiff's cause of action, although in fact it was omitted. So familiar and so unbending is the general rule that the books exhibit but few cases of a bold and obvious attempt to sue twice upon the same cause of action. In almost every instance, there is some apparent or substantial shade of difference relied on to save the bar, or the ingenuity of the pleader is exercised in disguising the grounds of the claim so that it may pass muster as a new cause of action. Hence it requires some nicety of discrimination, as well as familiarity with precedent, to determine in what cases the rule should apply. But at this day the ground has been so thoroughly explored as to leave but little uncertainty in the principles and rules which should govern. The point to be regarded is always the identity of the two claims. The reasons, the theories, the arguments, by which the contention is supported, are generally immaterial and not to be taken into account. According to the court in Texas: "It is of no consequence if the reasons urged to sustain the issue presented in this suit may not be precisely those relied upon, or in the mind of the pleader, when framing the petition in the first case. The applicability of the plea [of former recovery] depends upon the identity of the cause of action or matter of defense in issue, and not the identity or similarity of the points or grounds urged to support or maintain the action or matter of defense; otherwise litigation would only end when the ingenuity of counsel could not suggest additional grounds in support of the issue, though the gist of the issue may have been more than once considered and decided by the court."[282] But on the other hand, we must not forget that the same transaction or state of facts may give rise to distinct causes of action. It is not necessarily the identity of the subject-matter which determines the question.[283] For

Stone Co. v. Louisville, N. A. & C. Ry. Co., 131 Ind. 575, 31 N. E. 365; Chicago & S. E. Ry. Co. v. Yawger, 24 Ind. App. 460, 56 N. E. 50; Folz v. Nelke, 33 Ill. App. 370; Marshall v. John Grosse Clothing Co., 83 Ill. App. 338; Winham v. Kline, 77 Mo. App. 36.

[282] Girardin v. Dean, 49 Tex. 243.

[283] See Fisk v. City of Hartford, 70 Conn. 720, 40 Atl. 906, 66 Am. St. Rep. 147.

example, the judgment rendered in an action by two to enjoin the enforcement of a joint judgment against them is no bar to a separate action by one of them to enjoin the enforcement of the same judgment against him, on grounds personal to himself and in which his co-defendant has no interest.[284] So, a judgment of foreclosure is not a bar to an action by the mortgagee against the assignee of a policy of insurance held by the mortgagor for the benefit of the mortgagee.[285] And a judgment that a certain sale of mortgaged property under a power in the mortgage, and a sheriff's certificate based on the sale, are void, and that the party claiming under such certificate has no interest in the property by virtue of such sale or certificate, is no bar to an action subsequently brought to foreclose the mortgage.[286] And again, the cause of action may be different, although the same relief be asked. Thus, the dismissal of a bill to redeem pledged property, on the ground of staleness and the statute of limitations, is no bar to another bill seeking to redeem the same property under a pledge made four years after the first one.[287] So, a judgment dismissing a suit for specific performance of a promise to sign a lease is not a bar to a subsequent action on a verbal lease.[288] In a case in California, the plaintiff brought replevin against the defendants to recover certain property, and obtained a judgment for its restitution and damages for its illegal detention. Defendants paid the damages, but the property was not restored. Plaintiff then brought trover to recover the value of the property, and defendants pleaded the former recovery as a bar. But the court said: "The judgment in replevin constitutes no bar to this action, unless it be shown that it has been satisfied. The cause of action was in both cases the same, but the object was essentially different. In the one case the plaintiff sought to recover a specific personal chattel which was wrongfully detained; in the other, the value of such chattel, when, owing to the acts of defendants, it was not in his power to procure a return. . . . The judgment in the action

[284] Bilsland v. McManomy, 82 Ind. 139.
[285] Heins v. Wicke, 102 Iowa, 396, 71 N. W. 345.
[286] Lindgren v. Lindgren, 73 Minn. 90, 75 N. W. 1034.
[287] Gilmer v. Morris (C. C.) 35 Fed. 682.
[288] Laroussini v. Werlein, 50 La. Ann. 637, 23 South. 467.

of replevin was, as between the parties, conclusive evidence of the plaintiff's title to the chattel in question, and it only remained for the court, in this action, to determine its value." [289] So again, when land is purchased at a tax-sale by the owner's agent, ejectment by the owner against such agent to establish the validity of the tax-title, will not bar a suit between the same parties to declare a resulting trust in favor of such owner.[290]

§ 726. Identification of Causes of Action.

For the purpose of ascertaining the identity of the causes of action, the authorities generally agree in accepting the following test as sufficient: Would the same evidence support and establish both the present and the former cause of action? If so, the former recovery is a bar; if otherwise, it does not stand in the way of the second action.[291] "Unquestionably the judgment in the former action is well pleaded as a bar in this suit, provided the cause of action is the same, although the form of action has been changed. The cause of action is said to be the same when the same evidence will support both actions; or, rather, the judgment in the former action will be a bar, provided the evidence necessary to sustain a judgment for the plaintiff in the present action would have authorized a judgment for the plaintiff in the former." [292] But it must also be observed that "if the testimony offered in the second suit is sufficient

[289] Nickerson v. California Stage Co., 10 Cal. 520. See, also, Vinal v. Continental Const. & Imp. Co., 53 Hun, 547, 6 N. Y. Supp. 595.

[290] O'Connor v. Irvine, 74 Cal. 435, 16 Pac. 236.

[291] Stone v. United States, 12 C. C. A. 451, 64 Fed. 667; Jones v. Hillis (C. C.) 100 Fed. 355; Lawrence v. Vernon, 3 Sumn. 20, Fed. Cas. No. 8,146; Gates v. Goreham, 5 Vt. 317, 26 Am. Dec. 303; Riker v. Hooper, 35 Vt. 457, 82 Am. Dec. 646; Smith v. Whiting, 11 Mass. 445; Percy v. Foote, 36 Conn. 102; Miller v. Manice, 6 Hill (N. Y.) 114; Stowell v. Chamberlain, 60 N. Y. 272; Marsh v. Masterson, 50 N. Y. Super. Ct. 187; Crockett v. Routon, Dud. (Ga.) 254; Dawley v. Brown, 79 N. Y. 390; Marsh v. Pier, 4 Rawle (Pa.) 273, 26 Am. Dec. 131; Motley v. Harris, 1 Lea (Tenn.) 577; People v. Rickert, 159 Ill. 496, 42 N. E. 884; Gayer v. Parker, 24 Neb. 643, 39 N. W. 845, 8 Am. St. Rep. 227; Pratt v. Ratliff, 10 Okl. 168, 61 Pac. 523; Taylor v. Castle, 42 Cal. 367; Woolverton v. Baker, 98 Cal. 628, 33 Pac. 731; Bruce v. Foley, 18 Wash. 86, 50 Pac. 935; Martin v. Kennedy, 2 Bos. & P. 69.

[292] Taylor v. Castle, 42 Cal. 367.

to authorize a recovery, but could not have produced a different result in the first suit, the failure of the plaintiff in the first suit is no bar to his recovery in the other suit, although it is for the same cause of action for which he attempted to recover in the first suit."[293] This last rule may be illustrated by the case where the former action was dismissed because it was brought prematurely. Here the evidence on the merits, though amply sufficient to authorize a recovery in the second suit, could not have given the plaintiff a judgment in the first action, and therefore it is no bar.

§ 727. In Criminal Cases.

The test of identity described in the preceding section is understood to apply equally to cases of successive prosecutions for the same criminal offense.[294] "The true test," says the supreme court of Pennsylvania, "to determine whether a plea of autrefois acquit be a good bar, is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first."[295] The test, therefore, of the sufficiency of a plea of former conviction or acquittal is whether the facts averred in the second indictment, if found to be true, would have warranted a conviction upon the first. The two offenses must be the same, identical in law and in fact, or an acquittal or conviction of the one is not a bar to a prosecution for the other.[296]

§ 728. Certainty Required in Estoppels.

It is of the very essence of an estoppel that it be certain. And this applies with special force to estoppels by former recovery. "According to Coke, an estoppel must be certain to the very intent, and if, upon the face of a record, anything is left to conjecture as to what is necessarily involved and decided, there is no estoppel in it when

[293] Stringer v. Adams, 98 Ind. 539, citing Kirkpatrick v. Stingley, 2 Ind. 269; Indianapolis & C. R. Co. v. Clark, 21 Ind. 150; Hargus v. Goodman, 12 Ind. 629.

[294] Wharton, Cr. Law (7th Ed.) § 551.

[295] Heikes v. Com., 26 Pa. 513. And see In re Campbell's Registration, 197 Pa. 581, 47 Atl. 860.

[296] Gordon v. State, 71 Ala. 315.

pleaded, and nothing conclusive in it when offered in evidence." [297] Thus, in an action for specific performance of a contract to sell lands, where the issue is whether defendant ratified the unauthorized act of his agent in making the contract, a judgment for the defendant in a former action between the same parties for damages caused by recording such contract, and thus placing a cloud on the title is not conclusive where, under the instructions in that action, the jury might have found for defendant either on the ground that plaintiff had ratified the contract, or that no damage had been sustained by placing it on the record, and the verdict does not specify on which ground the jury based their verdict.[298] So, the record of a judgment in a suit on several distinct claims is not a bar to a subsequent suit by the same plaintiff on one of the same claims, where the record does not show that the claim was adjudicated in such suit, but merely that the other demands were determined in favor of the plaintiff.[299] So, where, in a suit for the infringement of a patent, the bill is dismissed because of failure to show any infringement, this will not estop the plaintiff from suing the same defendant again for infringing the same patent.[300]

§ 729. Estoppel cannot be Avoided by Varying Form of Action.

It is a well-settled rule, and one that is supported by a multitude of authorities, that a party cannot, by varying the form of action, or adopting a different method of presenting his case, escape the operation of the principle that one and the same cause of action shall not be twice litigated between the same parties or their privies.[301] His-

[297] Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Lillis v. Emigrant Ditch Co., 95 Cal. 553, 30 Pac. 1108; Griffith v. Fields, 105 Iowa, 362, 75 N. W. 325.

[298] De Sollar v. Hanscome, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. Ed. 956.

[299] Nashua & L. R. Corp. v. Boston & L. R. Corp., 164 Mass. 222, 41 N. E. 268, 49 Am. St. Rep. 454.

[300] Steam-Gauge & Lantern Co. v. Meyrose (C. C.) 27 Fed. 213.

[301] Routledge v. Hislop, 2 El. & El. 549; Hancock v. Welsh, 1 Stark. 347; Outram v. Morewood, 3 East. 346; Marine Ins. Co. v. Young, 1 Cranch, 332, 2 L. Ed. 126; Lawrence v. Vernon, 3 Sumn. 20, Fed. Cas. No. 8,146; Case v. New Orleans & C. R. Co., 2 Woods, 236, Fed. Cas. No. 2,493; Ware v. Percival, 61 Me. 391, 14 Am. Rep. 565; Bunker v. Tufts, 57 Me. 417; Brown v. Moran, 42 Me. 44; Gray v. Pingry, 17 Vt. 419, 44 Am. Dec. 345; Spencer v.

torically, this important rule is as old as the time of the Roman jurists,[302] and rests upon broad foundations of justice and expediency. That it has prevailed from very early times in the English law will appear from Slade's Case,[303] wherein "it was resolved that the plaintiff in this action on the case on assumpsit should not recover only damages for the special loss (if any be) which he had, but also for the whole debt, so that a recovery or bar in this action would be a good bar in an action of debt brought upon the same contract; so vice versa, a recovery or bar in an action of debt is a good bar in an action on the case on assumpsit." And to quote from a much later decision: "That the remedy sought, or the mere form of action, may be different, does not prevent the estoppel of the former adjudication. If, upon the facts in issue in the former action, the plaintiff was entitled in that action to a remedy such as the law awards as compensation or redress for the alleged wrong, or if, upon those facts, he was entitled to no remedy, adjudication of his right to recover in that action bars his right to afterwards seek

Dearth, 43 Vt. 98; Lindsey v. Danville, 46 Vt. 144; Livermore v. Herschell, 3 Pick. (Mass.) 33; Merriam v. Woodcock, 104 Mass. 326; Blackinton v. Blackinton, 113 Mass. 231; Norton v. Doherty, 3 Gray (Mass.) 372, 63 Am. Dec. 758; Smith v. Way, 9 Allen (Mass.) 472; Goodrich v. Yale, 97 Mass. 15; Harlow v. Bartlett, 170 Mass. 584, 49 N. E. 1014; Betts v. Starr, 5 Conn. 550, 13 Am. Dec. 94; Gardner v. Buckbee, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256; Taylor v. Taylor, 63 Hun. 303, 17 N. Y. Supp. 161; Boyd v. Boyd, 53 App. Div. 152, 65 N. Y. Supp. 859; Collins v. Bennett, 46 N. Y. 490; Brown v. Mayor, etc., of City of New York, 66 N. Y. 385; Baker v. Rand, 13 Barb. (N. Y.) 152; Rice v. King, 7 Johns. (N. Y.) 20; Cist v. Zeigler, 16 Serg. & R. (Pa.) 282, 16 Am. Dec. 573; Marsh v. Pier, 4 Rawle (Pa.) 273, 26 Am. Dec. 131; Ahl v. Goodhart, 161 Pa. 455, 29 Atl. 82; Harryman v. Roberts, 52 Md. 64; Hite v. Long, 6 Rand. (Va.) 457, 18 Am. Dec. 719; Ferguson v. Carter, 8 Ga. 524; Perry v. Lewis, 49 Miss. 443; Agnew v. McElroy, 18 Miss. 552, 48 Am. Dec. 772; Stuart v. Tenison Bros. Saddlery Co., 21 Tex. Civ. App. 530, 53 S. W. 83; Owens v. Rawleigh, 6 Bush (Ky.) 656; State Bank v. Rude, 23 Kan. 143; Walker v. Fuller, 29 Ark. 448; Covington & C. Bridge Co. v. Sargent, 27 Ohio St. 233; Bell v. McColloch, 31 Ohio St. 397; Sewell v. Scott, 35 La. Ann. 553; Kreuchi v. Dehler, 50 Ill. 176; Cole v. Favorite, 69 Ill. 457; Union R. & Transp. Co. v. Traube, 59 Mo. 355; Barker v. Cleveland, 19 Mich. 230; In re Skoll, 72 Minn. 319, 75 N. W. 231; Spear v. Tidball, 40 Neb. 107, 58 N. W. 708; Taylor v. Castle, 42 Cal. 367.

[302] Dig. 44, 2, 5. See Pothier on Obl. pt. 4, c. 3, § 3, art. 4, § 4.

[303] 4 Coke, 94b. See, also, Y. B. 12 Edw. IV, 13a.

a different remedy upon the same facts or cause of action."[304] Under this principle, we may cite the familiar rule that one who has been defeated, on the merits, in an action at law, cannot afterwards resort to a bill in equity upon the same facts for the same redress. And so also, where a claim has been once interposed by way of set-off, whether it was allowed or rejected, if it was considered on the merits, the judgment will bar any independent suit on the same claim.[305] But the cases most frequently calling for the application of this rule are those in which a party attempts to found two separate actions upon a transaction which justifies but one suit. For example, in a case in Minnesota, it appeared that the plaintiff had formerly brought trover against the defendant to recover damages for the alleged wrongful conversion of certain personalty, and now, upon the same state of facts, he sued to recover possession of the specific property itself. In each case he predicated his right to recover upon his general ownership and right of possession of the property, the wrongful possession of the defendant, and his refusal to return it upon the rightful claim of the plaintiff. The only difference was in the relief prayed for. It was held that the subject-matter and cause of action in both cases were the same, although the form of action and relief sought were different, and therefore the judgment in the first action was a bar to a recovery in the second.[306] So a recovery in an action of trespass for taking away the plaintiff's wife is a bar to a recovery in an action on the case for enticing her away.[307] Upon the same principle, "in all cases where the plaintiff has his option in the outset to bring tort or contract to recover damages for one and the same injury, upon a state of facts which will support either, an adjudication in one, whichever he may elect, is upon principle a bar to the other."[308] For instance, plaintiff sued defendant in covenant for breach of a sealed agreement in

[304] Hardin v. Palmerlee, 28 Minn. 450, 10 N. W. 773. And see Miller v. Manice, 6 Hill (N. Y.) 114, 122.

[305] Eastmure v. Laws, 5 Bing. N. C. 444.

[306] Hatch v. Coddington, 32 Minn. 92, 19 N. W. 393.

[307] Gilchrist v. Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469.

[308] Norton v. Doherty, 3 Gray (Mass.) 372, 63 Am. Dec. 758; Prince v. City of Quincy, 128 Ill. 443, 21 N. E. 768; Ware v. Percival, 61 Me. 391, 14 Am. Rep. 565.

respect to the making and delivery of a chattel, alleging certain defects; defendant pleaded accord and satisfaction, and judgment was in his favor; plaintiff then brought another action against him, in form ex delicto, based upon the deceit practised in concealing the same defects; defendant set up the former recovery, and it was held a good bar.[309] So where plaintiff brought assumpsit on an open account for moneys advanced to a third person which it was claimed the defendant was liable to pay, and was defeated, and subsequently brought an action of deceit against the same defendant, offering precisely the same evidence that was used on the former trial to sustain the declaration, it was held that the former judgment was a bar.[310] So again, where a proceeding by attachment for contempt is instituted as a means of private redress, and results in satisfaction, it may be pleaded in bar of a subsequent action of trespass between the same parties, founded on the same subject-matter.[311] Further, if the facts are the same, an unsuccessful attempt to secure relief or redress of a higher or more complete nature will often preclude a party from seeking a lower or lesser remedy. Thus it is held that a judgment upon the merits against the wife, in an action for absolute divorce on the ground of cruelty, is a bar to any subsequent action by her for a limited divorce on the same grounds.[312]

§ 730. Limitations of this Rule.

The rule stated in the preceding section is subject to certain important qualifications, which, without detracting from its proper force, serve to limit the field for its legitimate application. Thus, in the first place, if the plaintiff has misconceived his remedy and his suit is dismissed solely on that ground, it is no bar to a subsequent action rightly brought. It is true that the cause of action remains the same, but the first judgment was not upon the merits.[313] So, in

[309] Cutler v. Cox, 2 Blackf. (Ind.) 178, 18 Am. Dec. 152. See, also, Newby v. Caldwell, 54 Iowa, 102, 6 N. W. 154.

[310] Duncan v. Stokes, 47 Ga. 593.

[311] Walker v. Fuller, 29 Ark. 448.

[312] Wagner v. Wagner, 36 Minn. 239, 30 N. W. 766.

[313] Supra, § 715. And see Johnson v. East Tennessee, V. & G. Ry. Co., 90 Ga. 810, 17 S. E. 121.

the next place, there are sometimes cases in which a party, proceeding upon a certain theory as to the legal effect of a given transaction or state of facts, finds himself unable to substantiate his view of the case, but afterwards, without any change in the facts, but acting upon a different theory, renews the litigation in a different form. Here we must apply the test generally agreed upon as the proper means of ascertaining the identity of the causes of action, viz., whether the same evidence would support both suits. If not, there is no bar arising from the former judgment. For example, a judgment-creditor who has been defeated in a suit to have conveyances made in payment of indebtedness by an insolvent debtor declared fraudulent and void, is not estopped from subsequently bringing another suit to have such conveyances declared to be a part of a general assignment made by the debtor.[314] So where a suit to recover a sum of money claimed as a legacy has been dismissed on general demurrer, it cannot be pleaded in bar to a bill by the same party for the same sum claiming under a trust.[315] So an action on the case for a deceit in falsely representing that a farm contained a certain number of acres, is not a bar to an action of assumpsit upon a guaranty that the land was of that extent.[316] And in the next place, it must be remembered that the same act or fact may very possibly give rise to two or more distinct causes of action. And of course a judgment upon one of these does not preclude a recovery upon the other. Thus it is held that a judgment in trespass is no bar to trover for the same goods.[317] And similarly, in an action of trover, it was held that a judgment in detinue recovered by the plaintiff against the defendant for the same goods, which judgment remained unsatisfied, was no bar.[318]

[314] Elgin Nat. Watch Co. v. Meyer (C. C.) 29 Fed. 225.

[315] Woodland v. Newhall's Adm'r (C. C.) 31 Fed. 434.

[316] Schriver v. Eckenrode, 87 Pa. 213.

[317] Putt v. Rawstern, 3 Mod. 1.

[318] Elliot v. Porter, 5 Dana (Ky.) 299, 30 Am. Dec. 689. But see Thomason v. Odum, 31 Ala. 108, 68 Am. Dec. 159. And compare Union R. & T. Co. v. Traube, 59 Mo. 355.

§ 731. Judgment Conclusive of Whatever might have been litigated.

In connection with the principle which forbids a second litigation of the same cause of action, we are now to consider the important rule that the parties to a suit must make the most of their day in court, and bring forward all claims and demands properly belonging to the cause of action, as well as all their evidence and all necessary parts of their case or defense, on pain of being barred in a subsequent controversy. The general rule may be thus stated: A judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action.[319] This rule means, in the first place, that the parties must bring forward, in one trial, all the evidence and all the reasons which are extant and can be adduced in support of their respective cases. A litigant cannot experiment with the trial of his cause. After one determination of a suit on the merits, the controversy cannot be re-opened to hear an additional reason, which before existed and was within the knowledge of the party, in support of the same cause of action.[320] Thus, a judgment on the merits in an action for personal injuries, on the ground of

[319] Henderson v. Henderson, 3 Hare, 100; Nelson v. Couch, 15 C. B. (N. S.) 99; Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195; Southern Minnesota Ry. Extension Co. v. St. Paul & S. C. R. Co., 5 C. C. A. 249, 55 Fed. 690; David Bradley Manuf'g Co. v. Eagle Manuf'g Co., 6 C. C. A. 661, 57 Fed. 980; Board of Com'rs of Lake County v. Platt, 25 C. C. A. 87, 79 Fed. 567; Fayerweather v. Ritch, 34 C. C. A. 61, 91 Fed. 721; Landon v. Bulkley, 37 C. C. A. 96, 95 Fed. 344; Chavent v. Schefer (C. C.) 59 Fed. 231; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Pennock v. Kennedy, 153 Pa. 579, 26 Atl. 217; Northwestern Bank v. Hays, 37 W. Va. 475, 16 S. E. 561; Lindsley v. Thompson, 1 Tenn. Ch. 272; Chicago, K. & W. R. Co. v. Black, 47 Kan. 766, 29 Pac. 96; Desnoyers v. Dennison, 19 Ohio Cir. Ct. R. 320; Bates v. Spooner, 45 Ind. 489; Bailey v. Bailey, 115 Ill. 551, 4 N. E. 394; Terre Haute & I. R. Co. v. Peoria & P. U. Ry. Co., 81 Ill. App. 435; Pugh v. Williamson, 1 Mo. App. Rep'r, 361, 61 Mo. App. 165; Territory v. Santa Fé Pac. R. Co. (N. M.) 62 Pac. 985.

[320] Rogers v. Higgins, 57 Ill. 244; Macdougall v. Knight, 25 Q. B. Div. 1; Newell v. Neal, 50 S. C. 68, 27 S. E. 560.

defendant's negligence, is a bar to a second action between the same parties for the same injury, though additional acts of negligence are charged.[321] So where a plaintiff has unsuccessfully prosecuted to final judgment an action for the trial of title to land, he is concluded by the result, whether or not he then asserted all the claims which he had to the land.[322] And where an action to recover a debt is litigated on the theory that defendant is liable individually, the judgment is a bar to a subsequent action to charge him as a surviving partner, since his liability as surviving partner could have been tried in the former action.[323] For another example, in an action against the commissioners of a county to enjoin the assessment of the costs and expense of a road improvement, on the ground that the commissioners had no jurisdiction to order the improvement to be made, it was determined, upon a trial on the merits, that the commissioners had such jurisdiction. Afterwards the same parties brought an action against the commissioners to enjoin the same assessment for want of jurisdiction in the commissioners, for a reason not stated in the former action. But it was held that the question of jurisdiction was conclusively settled by the judgment in the first action.[324] So a judgment at law, for the defendant, is conclusive of the rights of the parties on a subsequent bill in equity, even if the complainant commenced and tried the action at law before he discovered or obtained all the evidence establishing alleged fraudulent acts of the defendant.[325] In the next place, the rule means that when a party has a fair legal opportunity to present and enforce his claim, he must avail himself of it.[326] Where, for instance, in an action to enforce a lien on land, it appears that the plaintiff was made a party and might have enforced his lien in a prior suit or proceeding by the administrator to sell said land, but failed to do so, the judgment in the first

[321] Columb v. Webster Manuf'g Co., 28 C. C. A. 225, 84 Fed. 592, 43 L. R. A. 195; McCain v. Louisville & N. R. Co. (Ky.) 22 S. W. 325.

[322] Des Moines & Ft. D. R. Co. v. Bullard, 89 Iowa, 749, 56 N. W. 498.

[323] Wilcox v. Gilchrist, 85 Hun, 1, 32 N. Y. Supp. 608.

[324] Martin v. Roney, 41 Ohio St. 141.

[325] Price v. Dewey (C. C.) 11 Fed. 104.

[326] See Bracken v. Atlantic Trust Co., 36 App. Div. 67, 55 N. Y. Supp. 506; McGillis v. Willis, 39 Ill. App. 311; Achey v. Creech, 21 Wash. 319, 58 Pac. 208.

proceeding is a bar to the latter.[327] Finally, a party must present his whole case. He must extend his claim so as to embrace everything which properly constitutes a part of his cause of action.[328] Thus a party failing to assert a claim or allowance in a suit in equity, in which it might have been litigated with propriety, will not be permitted afterwards to enforce it in a second suit, unless his failure to do so in the first was caused by the fraud of his adversary and was not attributable to his own negligence.[329]

§ 732. Restrictions of Foregoing Rule.

The generality of the terms in which the foregoing rule is usually announced has led the courts, in some of the cases, to see the necessity of laying stress upon its restrictions and limitations. "It is sometimes vaguely said that a judgment or decree is conclusive of everything that might have been litigated and settled in the action, but the statement is far too broad, unless it be taken as applying to the particular issue or matter actually litigated and determined, and such matters and things as are necessarily implied by them."[330] In another case it is said to be applicable to such matter only as might have been used as a defense in the former action against an adverse claim therein.[331] It does not include matters which, though affecting the ultimate rights of the parties as between themselves, were not material to the actual issues before the court or to the relief to be administered.[332] In fact, the rule "is limited in its application to those matters which the parties, under their pleadings and the issue joined in the former action, might legitimately have controverted and have had decided by the verdict and judgment, and has never been so extended as to compel one party, having several different causes of action against another, to join them in one action because

[327] Vail v. Rinehart, 105 Ind. 6, 4 N. E. 218. And see Kirk v. Goodwin, 53 Kan. 610, 36 Pac. 1057.

[328] Fleitas v. Meraux, 47 La. Ann. 232, 16 South. 848; Packham v. German Fire Ins. Co., 91 Md. 515, 46 Atl. 1066, 50 L. R. A. 828, 80 Am. St. Rep. 461; Hyde v. Leisenring, 107 Mich. 490, 65 N. W. 536.

[329] Stewart v. Stebbins, 30 Miss. 66; Burford v. Kersey, 48 Miss. 643.

[330] Williams v. Clouse, 91 N. C. 322.

[331] Malony v. Horan, 12 Abb. Prac. (N. S.; N. Y.) 289.

[332] Fairchild v. Lynch, 99 N. Y. 359, 2 N. E. 20.

they were of such a character that the law would permit their union." [333]

§ 733. Second Action Proceeding on Different Theory.

As we have already intimated, cases not infrequently arise in which a party, acting upon a certain theory as to his legal rights, or as to the legal effects of a given state of facts or transaction, brings his action and is defeated, being unable to substantiate his view of the case, and afterwards renews the litigation, without any change in the facts, but basing his claim on a new and more correct theory. In such a case, the former judgment is no bar to the second action. It is true the subject-matter is the same, but the cause of action set up in the former suit was, as shown by the result, merely illusory and supposititious, and hence it cannot be considered as identical, in any just sense of the term, with the true cause of action correctly set up and supported by a right theory of the facts.[334] Further, the evidence necessary to sustain the second action could not, if offered in the first, have altered the result. And this, as we have seen, is the one recognized test of identity. It will be expedient to illustrate this rather obscure principle by some examples from the reports. In a case in New York it appeared that the defendant company used the property of the plaintiffs in its business, under the belief of its managing agent that the company had purchased it, and the plaintiffs left the same in the possession of the company because it was their intention to sell it to the company, and they expected the company would pay for it. The plaintiffs first brought suit against the defendant to recover the value of this property as upon a sale thereof, but judgment went for the defendant on the ground that there was no sale and delivery. Then the plaintiffs sued to recover for the use of the property, and it was held that they were not barred by the

[333] Eastman v. Porter, 14 Wis. 39. See also Felton v. Smith, 88 Ind. 149, 45 Am. Rep. 454; Gentles v. Finck, 23 Misc. Rep. 153, 50 N. Y. Supp. 726; Schuster v. White's Adm'r (Ky.) 50 S. W. 242; Mussey v. Bates, 65 Vt. 449, 27 Atl. 167, 21 L. R. A. 516; Jones v. Beaman, 119 N. C. 300, 25 S. E. 970; Collier v. Cunningham, 2 Ind. App. 254, 28 N. E. 341.

[334] People v. Dalton, 52 App. Div. 371, 65 N. Y. Supp. 342; Dowdall v. Cannedy, 32 Ill. App. 207; Taylor v. Indiana Paper Co., 64 Ill. App. 339; Jones v. Kilbreth, 49 Ohio St. 401, 31 N. E. 346.

former judgment.[335] So again, plaintiff brought an action alleging partnership with the defendant and asking for an accounting. A referee found that no partnership had existed, and dismissed the complaint. Plaintiff then brought another action, alleging a hiring by the defendant, and that he was to have half the profits as wages. Defendant set up the former action in bar; but it was held to be no bar, because the causes of action alleged in the two suits were not the same.[336] So money paid under a mistake of fact may be recovered back in an action brought for that purpose, notwithstanding an adverse judgment in a prior action to recover back the same money on the ground of fraud on the part of the defendant.[337] Again, a judgment for defendant in an action at law to recover a partnership debt from defendant, as a general partner, based on the claim that defendant failed to contribute his capital in cash and that he fraudulently withdrew the assets from the firm, is not a bar to a creditors' bill by the same plaintiff for an accounting by defendant, as a special partner, for the assets withdrawn by him, the causes of action not being identical, and it not appearing that the question of the improper withdrawal of assets was involved and determined therein in defendant's favor.[338] A judgment on demurrer in an action in which it was sought to hold the indorsers of a note liable on the ground that due diligence had been used in the prosecution of an unsuccessful suit against the maker, is no bar to a second suit in which it is sought to hold the indorsers liable on the ground of demand and notice.[339] On similar principles, it is held that a judgment denying to the plaintiff a specific lien on property (as, in the case of an unsuccessful attempt to establish a mechanic's lien) will not be a bar to an action by him for the value of the services, advances, or material furnished to the defendant.[340] And where a plaintiff alleges an express contract to pay a stipulated sum for services rendered, but fails to re-

[335] Rider v. Union India Rubber Co., 28 N. Y. 379.

[336] Marsh v. Masterson, 101 N. Y. 401, 5 N. E. 59.

[337] Belden v. State, 103 N. Y. 1, 8 N. E. 363.

[338] Bell v. Merrifield, 109 N. Y. 202, 16 N. E. 55, 4 Am. St. Rep. 436.

[339] Keater v. Hock, 16 Iowa, 23.

[340] Geary v. Bangs, 138 Ill. 77, 27 N. E. 462; Texas, S. F. & N. Ry. Co. v. Saxton, 7 N. M. 302, 34 Pac. 532; Sease v. Dobson, 34 S. C. 345, 13 S. E. 530; Brown v. Squires' Adm'r, 42 W. Va. 367, 26 S. E. 177.

cover, he will not be precluded from bringing another action for the reasonable value of the services, as upon a quantum meruit.[341] Again, where a town borrowed money to pay the expenses of certain litigation, giving notes therefor, and, in an action at law upon these notes, the town was held not liable, as not having authority to borrow for such a purpose, it was held that the judgment was not a bar to a subsequent action in equity by the person who made the loan, claiming as the equitable assignee of the bills to pay which the money was borrowed.[342]

But it is not enough to bring a case within the foregoing rule that the party sets up new or additional reasons why his contention should prevail. In other words, a judgment will be allowed its full conclusive effect where the parties and the cause of action are the same, and the theory on which the case is based is not essentially different from that formerly litigated, although the plaintiff now brings forward new grounds of recovery, or the defendant now sets up new grounds of defense.[343] For instance, where a debtor assigned a note to his creditor, an attorney, as collateral security, and the latter took judgment on the note in his own name, but failed to collect it, and the debtor then sued the creditor for negligence as an attorney in not collecting the judgment, and a demurrer to the complaint was sustained, whereupon the debtor brought another suit, alleging the same facts, but counting on the creditor's negligence as an assignee, it was held that the former judgment was a bar to the second suit.[344]

§ 734. Rule against Splitting Causes of Action.

When a demand or right of action is in its nature entire and indivisible, it cannot be split up into several causes of action and made

[341] Buddress v. Schafer, 12 Wash. 310, 41 Pac. 43; Rossman v. Tilleny, 80 Minn. 160, 83 N. W. 42, 81 Am. St. Rep. 247; Henrietta Nat. Bank v. Barrett (Tex. Civ. App.) 25 S. W. 456.

[342] Wells v. Town of Salina, 25 N. Y. Supp. 134, 71 Hun, 559.

[343] Ross v. City of Portland (C. C.) 105 Fed. 682; Greene v. Central of Georgia Ry. Co., 112 Ga. 859, 38 S. E. 360; Werlein v. City of New Orleans, 177 U. S. 390, 20 Sup. Ct. 682, 44 L. Ed. 817; Hubbell v. United States, 171 U. S. 203, 18 Sup. Ct. 828, 43 L. Ed. 136; McGrady v. Monks, 1 Tex. Civ. App. 611, 20 S. W. 959.

[344] Nickless v. Pearson, 126 Ind. 477, 26 N. E. 478.

the basis of as many separate suits, but a recovery for one part will bar a subsequent action for the whole, the residue, or another part.[345] "The general rule," says the supreme court of Pennsylvania, "is that it is against the policy of the law to permit a plaintiff to prosecute in a second action for what was included in and might have been recovered in the first, because it would harass the defendant and expose him to double costs. This is so far modified that where claims are distinct, though all might have been recovered in the first action, it will not bar a second for one which was not demanded or proved in the first. But where the contract is entire, and there is a recovery upon such contract, the party cannot maintain a second suit even on clear proof that no evidence was given in the first as to part of the demand in controversy." [346] "The principle which prevents the splitting up of causes of action, and forbids double vexation for the same

[345] Fetter v. Beale, 1 Salk. 11; Bawell v. Kensey, 3 Lev. 179; Bagot v. Williams, 3 Barn. & C. 235; Baird v. United States, 96 U. S. 430, 24 L. Ed. 703; Bucki & Son Lumber Co. v. Atlantic Lumber Co., 48 C. C. A. 455, 109 Fed. 411; Claflin & Kimball v. Mather Electric Co. (C. C.) 87 Fed. 795; Horton v. New York Cent. & H. R. R. Co. (C. C.) 63 Fed. 897; Bartels v. Schell (C. C.) 16 Fed. 341; Hayward v. Clark, 50 Vt. 612; Avery v. Fitch, 4 Conn. 362; Wildman v. Wildman, 70 Conn. 700, 41 Atl. 1; Goodrich v. Yale, 97 Mass. 15; Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Willard v. Sperry, 16 Johns. (N. Y.) 121; Farrington v. Payne, 15 Johns. (N. Y.) 432; Miller v. Covert, 1 Wend. (N. Y.) 487; Clark v. Jones, 1 Denio (N. Y.) 519, 43 Am. Dec. 706; Guernsey v. Carver, 8 Wend. (N. Y.) 492, 24 Am. Dec. 60; Stevens v. Lockwood, 13 Wend. (N. Y.) 644, 28 Am. Dec. 492; Staples v. Goodrich, 21 Barb. (N. Y.) 317; Montrose v. Wanamaker, 134 N. Y. 590, 31 N. E. 252; Ingraham v. Hall, 11 Serg. & R. (Pa.) 78; Logan v. Caffrey, 30 Pa. 196; Alcott v. Hugus, 105 Pa. 350; Sykes v. Gerber, 98 Pa. 179; Carvill v. Garrigues, 5 Pa. 152; Eisenhower v. School Dist. of Borough of Centralia, 13 Pa. Super. Ct. 51; Fell v. Bennett, 110 Pa. 181, 5 Atl. 17; In re Strike, 1 Bland (Md.) 57; Hite v. Long, 6 Rand. (Va.) 457, 18 Am. Dec. 719; Bates v. Quattlebom, 2 Nott & McC. (S. C.) 205; Atlanta Elevator Co. v. Fulton Bag & Cotton Mills, 106 Ga. 427, 32 S. E. 541; Oliver v. Holt, 11 Ala. 578, 46 Am. Dec. 228; O'Neal v. Brown, 21 Ala. 485; South & N. A. R. Co. v. Henlein, 56 Ala. 368; Gatewood v. Long (Ky.) 51 S. W. 569; Wells v. Hickox, 1 Kan. App. 485, 40 Pac. 821; Erwin v. Lynn, 16 Ohio St. 539; Stein v. The Prairie Rose, 17 Ohio St. 475, 93 Am. Dec. 631; Mallock v. Krome, 78 Ill. 110; Taylor v. Heitz, 87 Mo. 660; Borngesser v. Harrison, 12 Wis. 544, 78 Am. Dec. 757; Beck v. Devereaux, 9 Neb. 109, 2 N. W. 365; Herriter v. Porter, 23 Cal. 385; Nightingale v. Scannell, 6 Cal. 506, 65 Am. Dec. 525.

[346] Sykes v. Gerber, 98 Pa. 179.

thing, is a rule of justice and not to be classed among technicalities. It was intended to suppress serious grievances." [347] In point of fact, this rule is not even a product of modern jurisprudence, but was well known in the Roman systems.[348] When the plaintiff, therefore, has an entire demand, he cannot divide it into distinct parts and bring separate actions for each; as, on an entire contract of sale of goods, he cannot maintain an action for one part of the goods sold and another action for another part.[349] And so he cannot divide an entire contract for the payment of a sum of money (a promissory note), exceeding the amount cognizable before a justice of the peace, into several smaller demands, and bring a distinct action before a justice upon each; and if an entire demand has been divided in this manner, and the justice renders judgment for the plaintiff in each of the actions, all the judgments will be reversed.[350] When an action is brought on a part only of an entire and indivisible demand, the pendency thereof may be pleaded in abatement of another action on the remainder, and a judgment in either may be pleaded in bar of the other.[351] Nor can the party, by assigning a part of his claim to another, divide an entire cause of action, so as to sustain more than one suit upon it.[352] Where a plaintiff brought suit upon a mechanic's claim in the district court, and withdrew one item of the claim on the trial, it was held that he could not afterwards bring a separate suit for the same item of charge, and the former recovery was a bar to the second action.[353]

But it is said that the rule forbidding the severance of a cause of action is for the benefit of the defendant, and therefore he may waive it. Thus, where, upon a consideration moving from the defendant, the plaintiff enters into an agreement for forbearance as to a portion of his claim, the defendant cannot plead a judgment on the remainder

[347] Dutton v. Shaw, 35 Mich. 431.

[348] Dig. 44, 2, 7.

[349] Smith v. Jones, 15 Johns. (N. Y.) 229.

[350] Willard v. Sperry, 16 Johns. (N. Y.) 121. And see Pilcher v. Ligon, 91 Ky. 228, 15 S. W. 513; Catawba Mills v. Hood, 42 S. C. 203, 20 S. E. 91; Broxton v. Nelson, 103 Ga. 327, 30 S. E. 38, 68 Am. St. Rep. 97.

[351] Hughes v. Dundee Mortgage & Trust Co. (C. C.) 26 Fed. 831.

[352] Ingraham v. Hall, 11 Serg. & R. (Pa.) 78.

[353] Smedly v. Tucker, 3 Phila. 259.

of the claim as a bar to a second action brought after the time of forbearance agreed upon has expired.[354] Nor can the rule against splitting causes of action be applied unless the two claims separately sued on were both parts of one and the same cause of action, equally available for purposes of suit at the time the first action was brought, and equally within the scope and purview of that action. For instance, where a state statute provides that if goods specified in a writ of replevin shall not be found, the plaintiff may recover their value in the same suit, a plaintiff who secures only a partial recovery in replevin, because part of the goods were not in the defendant's possession at the issuance of the writ, will not be precluded from bringing another suit to recover the value of the balance of the goods.[355] In another case, the plaintiff corporation, which held claims against the defendant corporation, growing out of a contract, accepted stock of defendant in satisfaction of a specified part of the claims upon certain conditions, to be performed by a time stated. The conditions not having been performed within such time, plaintiff tendered back the stock received. It had previously brought a suit on its unadjusted claims, which was then pending. It was held that the judgment in such suit could not be pleaded by defendant in bar of a subsequent suit upon the portion of the claims covered by the adjustment.[356] An action for breach of covenant of seisin is not a bar to an action for breach of covenant in the same deed against incumbrances; for the actions are not founded on the same cause of action, and therefore the rule prohibiting the splitting of a single cause of action has no application.[357] For similar reasons, this rule does not prevent one whose property is taken by a single trespass from maintaining replevin for so much of the property as is owned absolutely by him, and trover for the remainder, owned by him in common with another.[358]

[354] Claflin & Kimball v. Mather Electric Co., 39 C. C. A. 241, 98 Fed. 699. And see Little v. City of Portland, 26 Or. 235, 37 Pac. 911.

[355] Reid, Murdoch & Co. v. Parks, 122 Mich. 363, 81 N. W. 252; Taub v. McClelland-Colt Commission Co., 10 Colo. App. 190, 51 Pac. 168.

[356] Claflin & Kimball v. Mather Electric Co., 39 C. C. A. 241, 98 Fed. 699. And see Wheelock v. Svensgaard, 63 Minn. 486, 65 N. W. 937.

[357] Moore v. Johnston, 108 Ala. 324, 18 South. 825.

[358] Huffman v. Knight, 36 Or. 581, 60 Pac. 207.

§ 735. What Demands are Inseverable.

As a general rule, one single contract or agreement gives rise to one single cause of action and no more. And where an action is brought on a contract, all claims arising under the same and then due constitute an entire and indivisible cause of action, and a judgment therein is a bar to any further action founded on such claims.[359] "So where there are breaches of several covenants contained in one instrument, and a suit is brought for damages for some of the breaches, and subsequently a second suit is brought for damages claimed under other breaches, all of the causes of action being in existence at the beginning of the first suit, the first action may be used as a defense against the second." [360] If a lessor to whom rent is payable quarterly brings an action and recovers judgment for a part of a quarter, he cannot afterwards sue for the residue.[361] But on the other hand, in an action on a bond to indemnify against outstanding debts of a partnership, the defendant pleaded that there had been a former recovery on the same bond by the same plaintiff. But it appeared that the second suit was for breaches of the bond not embraced in the first suit, and that the former judgment was not for the penalty of the bond but merely for damages for certain breaches thereof. And it was held that several suits could be maintained on the same bond for different breaches, and that the former judgment constituted no bar to the second action.[362] A recovery by an attorney in one of two suits brought on different portions of a bill for fees, for the purpose of bringing it within a justice's jurisdiction, will bar a recovery in the other.[363] The rule against splitting up causes of action is applied with great strictness in actions upon book-accounts, as will appear from the recent case of Buck v.

[359] O'Beirne v. Lloyd, 43 N. Y. 248; Rosenmueller v. Lampe, 89 Ill. 212, 31 Am. Rep. 74; De Weese v. Smith (C. C.) 97 Fed. 309; City of New York v. Constantine (Super. N. Y.) 18 N. Y. Supp. 788; Samuel v. Fidelity & Casualty Co., 76 Hun, 308, 27 N. Y. Supp. 741.

[360] Joyce v. Moore, 10 Mo. 271. And see Hill v. Joy, 149 Pa. 243, 24 Atl. 293.

[361] Warren v. Comings, 6 Cush. (Mass.) 103.

[362] Orendorff v. Utz, 48 Md. 298; Ahl v. Ahl, 60 Md. 207.

[363] Lucas v. Le Compte, 42 Ill. 303.

Wilson.[364] There the defendant offered in evidence the record of a former recovery by the same plaintiff against him on the same book-account. When the first suit was brought, the whole of the account was due, but the plaintiff answered this by showing that at the institution of that suit he held defendant's promissory notes for part of the account, and at the trial he had only claimed and obtained a verdict for that part of the account not covered by such notes. These notes were not received as payment, but merely placed in the plaintiff's hands. It was held that the former recovery was a bar to the present action. A judgment for the plaintiff in an action on an attachment bond will bar any future action for damages accruing subsequent to the first; the cause of action in such case is one and indivisible, and if he brings his action too soon it is his own fault.[365] A recovery of the consideration money and interest, in a suit on a covenant in a conveyance that the grantor is the lawful owner of the premises, is a bar to a subsequent suit based on a covenant of warranty of title contained in the same deed.[366] In a suit in the nature of ejectment, the plaintiff recovered judgment for the premises in controversy and a nominal sum for damages; subsequently he brought an action against the same party for rents which accrued previous to the judgment; it was adjudged that the action could not be maintained.[367] So a recovery for use and occupation, in an action to recover the possession of real property, is a bar to a subsequent action for injury to the estate during the same period of occupation.[368] A judgment also is a single and indivisible cause of action. Where plaintiff was the assignee of a part of a judgment, and the other part, remaining unpaid, was assigned to a third person, and the plaintiff sought to obtain a separate judgment for his part of the original judgment by means of a scire facias, and to obtain an independent right to process for its collection, it was held that the undivided judgment could not be so separated into dis-

[364] 113 Pa. 423, 6 Atl. 97.

[365] Davis v. Milburn, 4 Iowa, 246.

[366] Leggett v. Lippincott, 50 N. J. Law, 462, 14 Atl. 577. And see Osborne v. Atkins, 6 Gray (Mass.) 423.

[367] Stewart v. Dent, 24 Mo. 111.

[368] Pierro v. St. Paul & N. P. R. Co., 37 Minn. 314, 34 N. W. 38.

tinct and independent parts.[369] Where a suit is brought in the name of a judge of probate, against an executor on his probate bond, to recover money in his hands which should be paid out in legacies and other claims, the plaintiff, though a trustee for different claimants, has the sole legal interest in the cause of action, and he has no more right to multiply suits, and unnecessarily to divide one cause of action into many, than any other plaintiff, and hence parties whose claims were due but were not taken into account in the suit are barred by the judgment.[370]

§ 736. Action on Running Account.

According to the doctrine of a majority of the best considered cases, a continuous running account, for goods sold, money lent, work and labor, or the like, is an entire demand, not susceptible of division, and cannot be split up into several causes of action. And where suit has been brought for part of the items of such an account, omitting other items of the same account which were due at the time, and judgment has been recovered therefor, such judgment is a bar to another action afterwards brought to recover for the items so omitted.[371] This rule, however, has not passed unchallenged, and it is repudiated in an important and able decision of the supreme court of Massachusetts.[372] But the reasoning in that case,

[369] Hopkins v. Stockdale, 117 Pa. 365, 11 Atl. 368.

[370] Pinney v. Barnes, 17 Conn. 420.

[371] Guernsey v. Carver, 8 Wend. (N. Y.) 492, 24 Am. Dec. 60; Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Oliver v. Holt, 11 Ala. 574, 46 Am. Dec. 228; Bunnel v. Pinto, 2 Conn. 431; Lane v. Cook, 3 Day (Conn.) 255; Ingraham v. Hall, 11 Serg. & R. (Pa.) 78; Borngesser v. Harrison, 12 Wis. 544, 78 Am. Dec. 757; Memmer v. Carey, 30 Minn. 458, 15 N. W. 877; Manley v. Tufts, 59 Kan. 660, 54 Pac. 683; Bolen Coal Co. v. Whittaker Brick Co., 52 Kan. 747, 35 Pac. 810.

[372] Badger v. Titcomb, 15 Pick. 409, 26 Am. Dec. 611. In this case, Wilde, J., in delivering the opinion of the court, observed: "The defendant next contends that a running account for goods sold, money paid, etc., is an entire demand, incapable of being split up for the purpose of bringing separate suits, and the case of Guernsey v. Carver, 8 Wend. (N. Y.) 492, 24 Am. Dec. 60, is relied on in support of this position, and if that case was rightly decided, we think it would maintain the present defense. But we know of no principle of law, nor of any other decided case, on which the decision in that case can be sustained. It is said that the law abhors a multiplicity of suits, and this

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approved in

v. Cross, 19 Wend. (N. Y.)

Folsom v. Clemence, 119
Hayes v. Reese, 34 Barb.
Whitley v. Broadway,
N. J. Law, 213; Horner v.
Douglass, 12 Bush (Ky.)
v. Murrell (Ky.) 45
Co. v. Alexander, 21

note, with the interest thereon, he is barred from again suing on the same cause of action on the ground that there was a mistake in assessing the proper amount of interest due.[376] Some cases, however, principally in virtue of the peculiar circumstances on which they were founded, have allowed a new action to be brought for demands inadvertently omitted from the former recovery.[377] In a case in Connecticut, where the plaintiff, in presenting his demand, credited the defendant with a certain part of the general claim for which the latter had given an order on a third person, and recovered judgment, and afterwards discovered that the order had never been accepted or paid, it was held that he was not precluded from maintaining his suit for the amount so credited on the order.[378] As in the case of mistakes of the parties, so also where the court commits errors or gives erroneous rulings, the judgment is nevertheless conclusive as to all that might and ought to have been recovered. Thus, where, in an action of covenant, the plaintiff was entitled to recover both present and prospective damages, but the court instructed the jury not to allow damages beyond the time of trial, in consequence of which the plaintiff recovered only his present damages, it was held that the judgment would nevertheless bar another action by him on the same covenant; for his remedy was by taking proper steps in the original cause to correct the error of the court.[379] And the same result follows where the inadequacy of the first judgment was due to an error made by the referee.[380] And so where, upon a confession of judgment before a justice, he makes an error in entering up the amount, all other proceedings being regular, no suit can be maintained for the omitted sum.[381] But the rule prohibiting a multiplicity of suits has no reference to a case where the party has no knowledge of his means of redress; and a former re-

[376] Wickersham v. Whedon, 33 Mo. 561.

[377] See Stevens v. Damon, 29 Vt. 521; Phillipps v. Bossard (D. C.) 35 Fed. 99; Byrket v. State, 3 Ind. 248; Lake v. Hancock, 38 Fla. 53, 20 South. 811, 56 Am. St. Rep. 159.

[378] Kane v. Morehouse, 46 Conn. 300.

[379] Winslow v. Stokes, 48 N. C. 285, 67 Am. Dec. 242.

[380] Bancroft v. Winspear, 44 Barb. (N. Y.) 209.

[381] Town v. Smith, 14 Mich. 348.

covery does not bar claims of which the plaintiff was ignorant, although they existed at the time and might have been joined.[382]

§ 738. Entire Claims Founded on Tort.

In respect to the rule against splitting up an entire and indivisible cause of action, there is no difference between actions founded on tort and those based on contracts. An entire claim arising from a single tort cannot be divided and made the subject of several suits, however numerous the items of damage may be. A judgment upon the merits in respect to any part will be available as a bar in other actions arising from the same cause.[383] Thus, for a single and completed trespass upon and injury to an entire tract of land several actions for damages cannot be maintained. A recovery of damages in respect to a part of the land will bar a subsequent recovery in respect to another part of the tract, the cause of action being entire.[384] So also if several chattels be taken at the same time and by the same tortious act, the right of action is single, and a recovery for any of them, either in trover or trespass, merges the whole cause of action and bars any subsequent suit for the residue.[385] Nor is

[382] Moran v. Plankinton, 64 Mo. 337; Alexander v. Bridgford, 59 Ark. 195, 27 S. W. 69; Gedney v. Gedney, 160 N. Y. 471, 55 N. E. 1; Jones v. Beaman, 117 N. C. 259, 23 S. E. 248; Ruehlmann v. Eleventh Ward Bldg. Ass'n, 7 Ohio N. P. 296.

[383] Ranken v. St. Louis & B. Suburban Ry. Co. (C. C.) 98 Fed. 479; Barnard v. Devine, 34 Misc. Rep. 182, 68 N. Y. Supp. 859; Stevens v. Pierce, 151 Mass. 207, 23 N. E. 1006; Foster v. Napier, 73 Ala. 595; Saddler v. Apple, 9 Humph. (Tenn.) 342; Wichita & W. R. Co. v. Beebe, 39 Kan. 465, 18 Pac. 502; Jungnitsch v. Michigan Malleable Iron Co., 121 Mich. 460, 80 N. W. 245; Herriter v. Porter, 23 Cal. 385.

[384] Pierro v. St. Paul & N. P. Ry. Co., 39 Minn. 451, 40 N. W. 520, 12 Am. St. Rep. 673; Cunningham v. Morris, 19 Ga. 583, 65 Am. Dec. 611. A railway having been constructed along a street on which the plaintiff owned two lots, he obtained a judgment for damages to one of them arising from the construction and operation of the road. It was held that this was a bar to a suit for damages to the other lot, accruing prior to the first action, from the same cause, although the two lots were separated by an intervening space of several hundred feet. Beronio v. Southern Pac. R. Co., 86 Cal. 415, 24 Pac. 1093, 21 Am. St. Rep. 57. And see Covington & C. Elevated Railroad & Transfer & Bridge Co. v. Kleimeier (Ky.) 49 S. W. 484.

[385] Union R. & Transp. Co. v. Traube, 59 Mo. 355; Farrington v. Payne, 15 Johns. (N. Y.) 432; O'Neal v. Brown, 21 Ala. 482; Thisler v. Miller, 53 Kan.

this rule altered by the fact that the articles forming the subject of the second suit would have been included in the first but for the fraud of the defendant;[386] nor even by the fact that, of the aggregate of the chattels, the plaintiff was holding a part in his own right and part as trustee for the benefit of others, if all were included in the same act of trespass.[387] An interesting example of the application of the main rule is found in a case recently ruled in Massachusetts, where it appeared that cinders from a locomotive of the defendant railroad company had set fire to the grass of the plaintiff's intestate and burned the grass and wood in two lots owned by him; defendant was sued for the injury, one count of the declaration alleging injury to both lots, and judgment was rendered for the plaintiff. Two years later the defendant was sued for the injury to one of the two lots by the fire, plaintiff claiming that in the first suit damages were only recovered for injuries to the other lot. But it was held that, the damages to both lots being the result of one single act of the defendant, the former judgment was a bar to the latter suit, although the plaintiff might have omitted to prove in that action all the damages he suffered.[388] So if the declaration in an action contains but one count, setting forth various trespasses, upon real estate, accompanied by particular acts of injury, a judgment therein for a portion of such acts is a bar to a subsequent action to recover damages for others of the same acts, because the cause of action is single and inseverable.[389] Furthermore, it is well settled that if the cause of action arises from one single tortious act, the plaintiff must recover all his damages in one action. If the wrong be continuous or recurring, every fresh injury will give ground for a fresh suit. But if the act complained of is single, completed, and

515, 36 Pac. 1060, 42 Am. St. Rep. 302; Skeen v. Springfield Engine & Thresher Co., 42 Mo. App. 158. A cause of action for damages for the negligent killing of two horses, at the same time and place, is entire and indivisible, and a recovery in a separate action for the death of one of them is a bar to a subsequent action for the death of the other. St. Louis S. W. Ry. Co. v. Moss, 9 Tex. Civ. App. 6, 28 S. W. 1038.

[386] McCaffrey v. Carter, 125 Mass. 330.

[387] O'Neal v. Brown, 21 Ala. 482.

[388] Knowlt n v. New York & N. E. R. Co., 147 Mass. 606, 18 N. E. 580, 1 L. R. A. 625. See, also, Trask v. Hartford & N. H. R. Co., 2 Allen (Mass.) 331.

[389] Goodrich v. Yale, 8 Allen (Mass.) 454.

not repeated, both present and prospective damages must be sought in a single action, and the recovery therein will bar any subsequent suit brought on the same tort, however unforeseen or aggravated may be the new injuries attributable to the old act.[890] This principle is strikingly illustrated in an English case, where the plaintiff recovered damages against the defendant in an action for assault and battery, and afterwards, as a consequence of the original trespass, a piece of his skull came out, whereupon he brought a new action for fresh damages. The defendant pleaded the former judgment in bar, and it was held a good plea. Said Holt, C. J.: "Here is not a new battery, and in trespass the grievousness or consequence of the battery is not the ground of the action, but the measure of the damages, which the jury must be supposed to have considered at the trial." [891] It is further to be observed that the law sometimes compels a party to make his election whether to proceed in tort or upon contract, and when he has thus elected he must abide by his choice. "A party cannot divide his cause of action, recover compensation in assumpsit by waiving the tort, and then, having received such compensation, resort to the tort which has been waived, and in that again recover compensation as though the tort had not been waived. He cannot waive all wrong-doing and recover compensation upon that basis, and then, treating the tort once waived as a subsisting grievance, recover damages which are to be assessed upon different principles." [892] On the same rule, a judgment for the defendant in an action of trover for a chattel is a bar to an action of trespass for the forcible taking of the same chattel, because, by bringing trover, plaintiff waives the trespass. If he had brought trespass, he might have recovered both the value of the

[890] Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Hodsoll v. Stallebrasse, 11 Adol. & El. 301; Whitney's Adm'r v. Town of Clarendon, 18 Vt. 252, 46 Am. Dec. 150; Watson v. Van Meter, 43 Iowa, 76.

[891] Fetter v. Beale, 1 Salk. 11.

[892] Ware v. Percival, 61 Me. 393, 14 Am. Rep. 565. See, also, Smith v. Way, 9 Allen (Mass.) 472; Ellis v. Crowl, 46 Kan. 100, 26 Pac. 454; Kapischke v. Koch, 180 Ill. 44, 54 N. E. 179. In the case last cited, it was held that, in an action of trespass for the unauthorized seizure and retention of goods obtained on a writ of replevin, it is proper for the court to direct a peremptory finding for the defendant, where admissions of counsel establish the fact that a judgment had been obtained on the replevin bond and satisfied.

property and damages for the violence used. And since he must recover all the damages he can in respect to the same act or transaction in one suit, the case comes within the rule against dividing an inseverable cause of action.[393]

§ 739. Recovery in Malicious Prosecution bars Action for Slander.

On the principle that all damages for one wrong must be recovered in one action, it is held that a judgment in an action for malicious prosecution will bar a subsequent suit for the defamation of character involved in the false charge. "In an action for malicious prosecution," says the court of appeals of New York, "the plaintiff is entitled to recover damages not only for his unlawful arrest and imprisonment, and for the expenses of his defense, but for the injury to his fame and character by reason of the false accusation. The latter indeed is, in many cases, the gravamen of the action. An accusation of crime, made under the forms of law, or on the pretense of bringing a guilty man to justice, is made in the most imposing and impressive manner, and may inflict a deeper injury upon the reputation of the party accused than the same words uttered under any other circumstances. The most appropriate remedy for the calumny in such cases is by the action for malicious prosecution. The injured party cannot be entitled to two recoveries for the same cause, and a recovery in that form must therefore be a bar to a subsequent action of slander for the same identical accusation." [394]

§ 740. Distinct Injuries from Same Tortious Act.

We have seen that, as a rule, only one cause of action can arise from one tort. But there are exceptional cases in which the same act may occasion several distinct injuries, and these may be made the basis of as many separate suits. Thus damage to goods and injuries to the person, although caused by one and the same wrong-

[393] Hite v. Long, 6 Rand. 457, 18 Am. Dec. 719. And see Union R. & Transp. Co. v. Traube, 59 Mo. 355.

[394] Sheldon v. Carpenter, 4 N. Y. 579, 55 Am. Dec. 301. See, also, Jarnigan v. Fleming, 43 Miss. 724, 5 Am. Rep. 514; Rockwell v. Brown, 36 N. Y. 207; Townsh. Sland. & L. § 251.

ful act, are infringements of different rights and give rise to distinct causes of action; and therefore the recovery of compensation for the damage to the goods is no bar to an action subsequently commenced for the personal injury.[395] And again, the rights of different persons, or of the same person in different capacities, may be violated by the same tortious act. Thus, a stranger, committing waste on premises leased or held by a particular estate, is liable to the tenant for the injury to the possession, and to the landlord or reversioner for the injury to the freehold or inheritance; and the right of each is distinct from that of the other, and satisfaction made to one is no bar to an action brought by the other.[396] So, recovery by a husband for injuries to himself is not a bar to a subsequent action for injuries to his wife, sustained at the same time, and as a result of the same negligence or fault.[397] And where two brothers are at the same time killed by the collision of a railroad train with the vehicle in which they were riding, a recovery for the negligent killing of one is not a bar to an action for the negligent killing of the other, though the same person brings both actions as administrator.[398] So again, a judgment in an action by a partnership for injuries to property by the operation of an elevated railroad is no bar to a subsequent action by one of the partners for personal injuries resulting from the same unlawful acts of the company.[399] But on the other hand, the recovery of a judgment by factors for injury to goods in their possession, and on which they have a lien, is a bar to an action for such injury by the owner.[400] But an action against a railroad company or other corporation, for personal injuries to a minor, caused by the fault or negligence of the defendant, brought in behalf of such infant by his father as next friend, is

[395] Brunsden v. Humphrey, L. R. 14 Q. B. Div. 141; Watson v. Texas & P. Ry. Co., 8 Tex. Civ. App. 144, 27 S. W. 924. Compare Reilly v. Sicilian Asphalt Pav. Co., 31 App. Div. 302, 52 N. Y. Supp. 817.

[396] California Dry Dock Co. v. Armstrong (C. C.) 17 Fed. 216.

[397] Texas & P. Ry. Co. v. Nelson, 9 Tex. Civ. App. 156, 29 S. W. 78.

[398] Illinois Cent. R. Co. v. Slater, 139 Ill. 190, 28 N. E. 830.

[399] Taylor v. Manhattan Ry. Co., 53 Hun, 305, 6 N. Y. Supp. 488; Cahnmann v. Metropolitan St. Ry. Co., 35 Misc. Rep. 127, 71 N. Y. Supp. 317.

[400] Porter v. Schendel, 25 Misc. Rep. 779, 55 N. Y. Supp. 602. And see Illinois Cent. R. Co. v. Miller, 32 Ill. App. 259.

not, either as to the cause of action or as to the parties, actually or substantially the same as a suit by the father in his own right against the same defendant for the loss of the child's services, occasioned by the same injuries; and therefore a judgment recovered in one of such actions is no bar to the prosecution of the other.[401] And a former recovery by the father, for the loss of the child's services, is no bar to a recovery by him, as administrator, of such damages as the child himself might have recovered, including exemplary damages.[402] On the same principle, a wife's right of action for injuries sustained by her is entirely distinct from her husband's right of action for the loss of her services and her society occasioned by the same injuries.[403] And an action by an administrator for the wrongful killing of his intestate, for the benefit of the widow and next of kin, is not a bar to an action to recover, for the benefit of the estate, the medical and funeral expenses, and damages for mental anguish suffered by the deceased after receiving the injury which caused his death.[404] Again, the constitutional rule that no person shall be twice put in jeopardy for the same offense does not inhibit an action for a civil penalty for a tortious act in addition to a criminal prosecution therefor.[405] A decree in favor of a lot-owner, assessing damages for the grading of a street, rendered before the grading was done, and specially confining the assessment to damages resulting from ordinary grading, is not a bar to a subsequent action by the same owner for negligent grading, injuring his premises.[406] But where a statute provides for an action of debt for a

[401] Wilton v. Middlesex R. Co., 125 Mass. 130; Hooper v. Southern Ry. Co., 112 Ga. 96, 37 S. E. 165; Bernard v. Merrill, 91 Me. 358, 40 Atl. 136; Bamka v. Chicago, St. P., M. & O. Ry. Co., 61 Minn. 549, 63 N. W. 1116, 52 Am. St. Rep. 618; South & N. A. R. Co. v. Donovan, 84 Ala. 141, 4 South. 142; McNamara v. Logan, 100 Ala. 187, 14 South. 175; Sibley v. Ratliffe, 50 Ark. 477, 8 S. W. 686; Central R. Co. v. Brinson, 64 Ga. 475; Horgan v. Pacific Mills, 158 Mass. 402, 33 N. E. 581, 35 Am. St. Rep. 504.

[402] Bradley v. Andrews, 51 Vt. 525; Karr v. Parks, 44 Cal. 46.

[403] Denver Cons. Tramway Co. v. Riley, 14 Colo. App. 132, 59 Pac. 476.

[404] St. Louis, I. M. & S. Ry. Co. v. Sweet, 63 Ark. 563, 40 S. W. 463. But see Clare v. New York & N. E. R. Co., 172 Mass. 211, 51 N. E. 1083.

[405] State v. Schoonover, 135 Ind. 526, 35 N. E. 119, 21 L. R. A. 767; McDonald v. Stark, 176 Ill. 456, 52 N. E. 37.

[406] Jones v. City of Seattle, 23 Wash. 753, 63 Pac. 553. And see Kehoe v. City of Philadelphia, 199 Pa. 45, 48 Atl. 679.

penalty, to be brought in the name of the state, for the use of any person who is injured by a violation of the provisions of the act in relation to the operation of a railroad or the running of its trains, a person who is so injured, in his person or property, must choose whether he will seek his remedy under such statute or by an action at common law; and if he recovers his damages in an action of trespass, he cannot afterwards sue under the statute for the same injuries.[407]

§ 741. Distinct Trespasses.

In view of what has been said concerning inseverable demands arising ex delicto, it is important to add that distinct trespasses or other torts, although they may be more or less connected, will give rise to distinct causes of action.[408] Thus where there are distinct trespasses, committed consecutively, but in different localities, and the plaintiff institutes his action for one only, such former suit and judgment thereon, although the action might properly have embraced both the torts, yet constitutes no bar to a second suit for the other act.[409] So a judgment for defendants in an action for the trespassing of their cattle on the plaintiff's land, is not a bar to a subsequent action for similar trespasses, occurring prior to those alleged in the former action.[410] A judgment of a court of admiralty upon a libel filed against the master of a vessel by one of the crew, complaining of an assault and imprisonment alleged to have been committed on the high seas, is not a bar to an action by the mariner against the master in a court of common law for an assault and imprisonment on shore in a foreign port in the course of the voyage.[411]

[407] Terre Haute & I. R. Co. v. People, 41 Ill. App. 513; Illinois Cent. R. Co. v. People, 84 Ill. App. 260.

[408] Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Missouri Pac. Ry. Co. v. Scammon, 41 Kan. 521, 21 Pac. 590; Amrhein v. Quaker City Dye Works, 192 Pa. 253, 43 Atl. 1008.

[409] White v. Moseley, 8 Pick. (Mass.) 356.

[410] De La Guerra v. Newhall, 55 Cal. 21.

[411] Adams v. Haffards, 20 Pick. (Mass.) 127.

§ 742. Continuing Damages from Tort.

A former recovery in an action for a nuisance is no bar to a subsequent action between the same parties for a continuance of the nuisance.[412] Thus, where the trustees of a turnpike road built buttresses to support it on the land of A., and A. thereupon sued them and their workmen in trespass for such erection, and accepted money paid into court in full satisfaction for the trespass, it was held that after notice to the defendants to remove the buttresses and their refusal to do so, A. might bring another action of trespass against them for keeping and continuing the buttresses on the land, to which the former recovery was no bar.[413] So, a judgment in a former action against a railroad company or other corporation for damages to real property caused by the construction of its road or other works, sustained up to the time of the commencement of such former action, is not a bar to an action for such damages accruing subsequently.[414] Thus, where the faulty or negligent construction of a railroad causes it to obstruct or dam the waters of a stream, so as to overflow the lands of an adjoining proprietor, a judgment recovered by the latter for the damages occasioned by one such overflow (as, for injury to crops, deposit of debris on his land, undermining of buildings, or the like) will not be a bar to a subsequent suit for damages for subsequent injuries arising from the same cause.[415] So, a judgment for the diversion of water which supplied plaintiff's

[412] Smith v. Elliott, 9 Pa. 345; Brakken v. Minneapolis & St. L. Ry. Co., 32 Minn. 425, 21 N. W. 414; Byrne v. Minneapolis & St. L. Ry. Co., 38 Minn. 212, 36 N. W. 339, 8 Am. St. Rep. 668.

[413] Holmes v. Wilson, 10 Adol. & E. 503. Compare Clarke v. Yorke, 47 Law T. (N. S.) 381.

[414] Rumsey v. New York & N. E. R. Co., 63 Hun, 200, 17 N. Y. Supp. 672, affirmed 137 N. Y. 563, 33 N. E. 338; Hoch v. Manhattan Ry. Co., 59 Hun, 541, 13 N. Y. Supp. 633; Hartman v. Pittsburg Incline Plane Co., 11 Pa. Super. Ct. 438.

[415] Ridley v. Seaboard & R. R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708; Ohio, I. & W. Ry. Co. v. Dooley, 32 Ill. App. 228; Cleveland, C., C. & St. L. Ry. Co. v. Nuttall, 59 Ill. App. 639; McKee v. St. Louis, K. & N. W. R. Co., 49 Mo. App. 174; Rarey v. Lee, 7 Ind. App. 518, 34 N. E. 749; Clark v. Dyer, 81 Tex. 339, 16 S. W. 1061; Bowers v. Mississippi & R. R. Boom Co., 78 Minn. 398, 81 N. W. 208, 79 Am. St. Rep. 395.

mill, limited by its terms to damages sustained from the time of the diversion to the commencement of the action, does not bar an action for the damages afterwards sustained.[416]

According to the generally accepted doctrine, in an action for the continuance of a trespass or nuisance, a former proceeding upon the same cause of action and between the same parties, or those under whom they claim, wherein judgment was recovered by the plaintiff, is conclusive of the rights of the parties; the defendant is estopped to deny the existence or character of the nuisance or the plaintiff's right to recover, and the latter need only prove that the nuisance remains in the same condition as before, or in a more or less damaging condition.[417] But this rule is not universally acknowledged. In some few states it is held that such former judgment is prima facie but not conclusive evidence of the plaintiff's right to recover.[418] If a conclusive effect is to be given to the former verdict for the plaintiff, the same consequences should attend a verdict given for the defendant. And this indeed appears to be the rule. Thus, where the plaintiff, in a former action against the same defendant, sought to recover on account of the obstruction of an alleged natural watercourse, and one of the necessary questions in that case was whether the alleged watercourse was really such in contemplation of law, or only a way of escape for surface-water, and there was a general verdict for defendant and judgment accordingly, it was held that the question was adjudicated against the plaintiff, and he could not maintain another action against the defendant for the obstruction of the same alleged stream, although in the new action he alleged that the obstruction had been made wider and higher.[419] But where the plaintiff might, without any

[416] Covert v. City of Brooklyn, 13 App. Div. 188, 43 N. Y. Supp. 310.

[417] Smith v. Elliott, 9 Pa. 345; Schoch v. Foreman, 3 Brewst. (Pa.) 157; Long v. Trexler (Pa.) 8 Atl. 620; Hartman v. Pittsburg Incline Plane Co., 2 Pa. Super. Ct. 123; Plate v. New York Cent. R. Co., 37 N. Y. 472.

[418] Richardson v. Boston, 19 How. 263, 15 L. Ed. 639; Standish v. Parker, 2 Pick. (Mass.) 20, 13 Am. Dec. 393; Shepherd v. Willis, 19 Ohio, 142; Nivin v. Stevens, 5 Har. (Del.) 272.

[419] Hahn v. Miller, 68 Iowa, 745, 28 N. W. 51. See Smith v. Inhabitants of Brunswick, 80 Me. 189, 13 Atl. 890. But the fact that plaintiff recovered only nominal damages, in an action for a continuing tort, is not conclusive against

new act on the part of the defendant after the former suit was commenced, have sustained damage between the time of bringing that suit and the time of bringing the present suit, and such damage might have resulted from the same positive acts complained of in the former suit, by reason of the longer continuance of the state of facts which those acts established, a verdict for defendant in the former suit is not conclusive upon the plaintiff in the latter.[420]

§ 743. Distinction between Permanent and Recurring Trespass or Nuisance.

In the class of cases now under consideration, it is important to inquire into the character of the injury complained of, with reference to its being of a periodical and recurring nature or permanent and unalterable. The rule is, that for trespasses or nuisances that are not of a permanent character, damages can only be recovered for the injury sustained up to the time of the commencement of the suit, and every repetition of the trespass or continuance of the nuisance is a fresh injury giving a right to a new suit; but as to trespasses and nuisances that are of a permanent character, a single recovery may and must be had for the whole damage resulting from the act, and no second action will lie.[421] "Wherever the nuisance is of such a character that its continuance is necessarily an injury, and when it is of a permanent character, that will continue without change from any cause except human labor, there the damage is an original damage and may be at once fully compensated, since the injured person has no means in his power to compel the individual

his right to maintain another action for the same tort several years later. Stafford v. Maddox, 87 Ga. 537, 13 S. E. 559.

[420] Jones v. Lavender, 55 Ga. 228.

[421] Denver City Irrigation & Water Co. v. Middaugh, 12 Colo. 434, 21 Pac. 565, 13 Am. St. Rep. 234; Chicago & A. R. Co. v. Maher, 91 Ill. 312; Omaha & R. V. R. Co. v. Standen, 22 Neb. 343, 35 N. W. 183; Stodghill v. Chicago, B. & Q. R. Co., 73 Iowa, 341, 5 N. W. 495; Town of Troy v. Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177; Fowle v. New Haven & N. Co., 107 Mass. 352; Clark v. Lanier, 104 Ga. 184, 30 S. E. 741; Brown v. Southwestern Telegraph & Telephone Co., 17 Tex. Civ. App. 433, 44 S. W. 59; International & G. N. Ry. Co. v. Gieselman, 12 Tex. Civ. App. 123, 34 S. W. 658; Lake Erie & W. Ry. Co. v. Purcell, 75 Ill. App. 573; Hodge v. Shaw, 85 Iowa, 137, 52 N. W. 8, 39 Am. St. Rep. 290; City of Los Angeles v. Baldwin, 53 Cal. 469.

doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means. But where the continuance of such act is not necessarily injurious, and where it is necessarily of a permanent character, but may or may not be injurious, or may or may not be continued, there the injury, to be compensated in a suit, is only the damage that has happened." [422] In the Massachusetts reports we find a passage which at once states and illustrates the rule, in the following language: "The embankment of the defendants was a permanent structure, which, without any further act except keeping it in repair, must continue to turn the current of the river in such a manner as gradually to wash away the plaintiff's land. For this injury the plaintiff might recover in one action entire damages, not limited to those which had been actually suffered at the date of the writ. And the judgment in one such action is a bar to another like action between the parties for subsequent injuries from the same cause." [423] So again, a recovery of damages for the deterioration in the value of the plaintiff's premises by the erection and maintenance of gas-works in the vicinity, polluting the water of the plaintiff, is a bar to any farther prosecution for the same cause, and it is error to refuse proof of such former recovery in a second action for a continuance of the injury.[424] But recent decisions, as shown in the preceding section, hold that a former judgment for damages to plaintiff's land by overflows of a stream, caused by the defendant's railroad bridge, which was improperly and negligently constructed and maintained, will not be a bar to a recovery for other injuries to the land sustained subsequent to the former suit by a continuance of such bridge.[425]

[422] Town of Troy v. Cheshire R. Co., 23 N. H. 83, 55 Am. Dec. 177.

[423] Fowle v. New Haven & N. Co., 107 Mass. 352. See, also, Stodghill v. Chicago, B. & Q. R. Co., 53 Iowa, 341, 5 N. W. 495; Powers v. City of Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792. Compare Illinois Cent. R. Co. v. Wilbourn, 74 Miss. 284, 21 South. 1.

[424] Decatur Gaslight & Coke Co. v. Howell, 92 Ill. 19.

[425] Chicago, B. & Q. R. Co. v. Schaffer, 124 Ill. 112, 16 N. E. 239; Cleveland, C., C. & St. L. Ry. Co. v. Nuttall, 59 Ill. App. 639; Ridley v. Seaboard & R. R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708; and other cases cited in the preceding section.

§ 744. Plaintiff not Required to Join Distinct Demands.

While a party is not allowed to split up an entire and inseverable cause of action and prosecute it by piecemeal, nor to present only a portion of the grounds on which relief is sought, and save the rest for a second suit if the first fail, yet this rule does not require that distinct causes of action, each of which by itself would authorize independent relief, should be presented in a single suit, although they exist at the same time and might be considered together.[426] In the language of the court in New York: "It is entire claims only which cannot be divided within this rule, those which are single and indivisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes, the prosecution of several actions upon several causes of action. The holder of several promissory notes may maintain an action on each; a party upon whose person or property successive distinct trespasses have been committed may bring a separate suit for every trespass; and all demands, of whatever nature, arising out of separate and distinct transactions, may be sued upon separately. It makes no difference that the causes of action might be united in a single suit; the right of the party in whose favor they exist to separate suits is not affected by that circumstance, except that in proper cases, for the prevention of vexation and oppression, the court will enforce a consolidation of the actions."[427] On this principle, the holder of several overdue promissory notes, all against

[426] Stark v. Starr, 94 U. S. 477, 24 L. Ed. 276; Olsen v. Whitney (D. C.) 109 Fed. 80; Phillips v. Berick, 16 Johns. 136, 8 Am. Dec. 299; Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Gedney v. Gedney, 160 N. Y. 471, 55 N. E. 1; Gentles v. Finck, 23 Misc. Rep. 153, 50 N. Y. Supp. 726; Govin v. De Miranda, 9 Misc. Rep. 684, 39 N. Y. Supp. 550; Milligan v. Browarsky, 147 Pa. 155, 23 Atl. 398; Daniels v. Heidenreich, 8 Kulp (Pa.) 413; Gottlieb v. Fred. W. Wolf Co., 75 Md. 126, 23 Atl. 198; Snow Steam Pump Co. v. Dunn, 119 N. C. 77, 25 S. E. 741; Boyle v. Wallace, 81 Ala. 352, 8 South. 194; New Orleans, M. & T. R. Co. v. Castello, 50 Ala. 12; Schuster v. White's Adm'r (Ky.) 50 S. W. 242; Collier v. Cunningham, 2 Ind. App. 254, 28 N. E. 341; Sherer v. Langford, 67 Ill. App. 342; Corby v. Taylor, 35 Mo. 447; Eastman v. Porter, 14 Wis. 39; Latta v. Visel, 37 Neb. 612, 56 N. W. 311; Journe v. Hewes, 124 Cal. 244, 56 Pac. 1032.

[427] Secor v. Sturgis, 16 N. Y. 548.

the same parties, may bring a separate action upon each, and a recovery in one action is no bar to the others; and further, the fact that the notes were all given upon settlement of one identical demand does not make each a part of the original demand so as to compel the holder to join them all in one suit.[428] So where defendant had agreed to receive four certain bonds held by the plaintiff and pay a certain sum for the same, it was held that the latter might tender any one of the bonds and demand its proportionate share of the purchase price, and a judgment for such share of the money due, for one bond, was no bar to an action for the price of the others.[429] On the same rule, each claim presented to and rejected by a board of supervisors constitutes a distinct and separate cause of action, and a judgment obtained on one will not bar an action for the recovery of the others.[430] So the entry of a decree of foreclosure and sale of mortgaged premises does not bar another action of foreclosure upon a junior mortgage of the same premises.[431] To exhibit the application of the rule under somewhat different circumstances, we may cite a case from Wisconsin,[432] in which it was held that a cause of action for goods destroyed by fire while in defendant's hands as a carrier, and a cause of action existing at the same time in favor of the same person against the same defendant for goods destroyed by fire while in such defendant's hands as a warehouseman, need not be joined, and a judgment upon one is no bar to a subsequent action on the other. "In the former action," said the court, "the defendant was liable though not negligent; in this action the defendant is not liable unless the loss was caused by its negligence. Hence the two causes of action are entirely different, and require different lines of proof to maintain them. Under all the authorities, the claims in the two actions do not constitute one entire and indivisible cause of action, but separate and distinct claims, for which separate suits may be maintained." Two separate and distinct sales of merchandise, though made on the same day to

428 Nathans v. Hope, 77 N. Y. 420.

429 Mills v. Garrison, 3 Abb. Dec. (N. Y.) 297.

430 Hughes v. Mendocino Co. (Cal.) 4 Pac. 236.

431 Bache v. Purcell, 51 How. Prac. (N. Y.) 270.

432 Kronshage v. Chicago, M. & St. P. Ry. Co., 45 Wis. 500. But see Bassett v. Connecticut River R. Co., 150 Mass. 178, 22 N. E. 890.

the same purchaser, do not constitute an entire or inseverable cause of action, unless by express or implied contract to that effect, where the bills of sale conclusively show that each was an independent transaction.[433] So the interest coupons attached to a municipal bond constitute distinct causes of action from the bond itself.[434] A judgment in an action against a lessee for a breach of the covenant to pay rent is not a bar to an action for damages for negligence in the care of the premises.[435] So, where one agrees to pay a specified sum of money at once, and at a subsequent time to convey certain real estate, he subjects himself to liability in separate actions, and a judgment in an action to recover the money does not bar an action for damages for breach of the agreement to convey the land.[436] Again, a person having two independent claims against the estate of a decedent is not bound to unite them in one action or proceeding; and judgment for one is no bar to an action for the other, unless the executor can show that the second claim is directly connected with the first and naturally a part of it.[437] For the same reason, where a municipal corporation recovers judgment for taxes assessed on one of several parcels of land belonging to the same person, this will be no bar to an action for the taxes chargeable under the same assessment on the other parcels.[438] A salaried superintendent, who agreed with his employer to board its workmen, buy supplies, and pay certain expenses on its account, and who has left his place and recovered judgment for the salary due him, may bring a second suit for board furnished, supplies bought, and money paid, the latter cause of action being independent of the former.[439] In West Virginia, a statute provides that, when a plaintiff has several demands against the same defendant, founded on contract, he must bring his action for the whole amount due and payable at the time; but yet it is held that, where a party has two separate demands

[433] Alkire Grocery Co. v. Tagart, 1 Mo. App. Rep'r, 159, 60 Mo. App. 389.

[434] Nesbit v. Independent District of Riverside, 144 U. S. 610, 12 Sup. Ct. 746, 36 L. Ed. 562.

[435] Wright v. Tileston, 60 Minn. 34, 61 N. W. 823.

[436] Reynolds v. Franklin, 47 Minn. 145, 49 N. W. 648.

[437] Gedney v. Gedney, 19 App. Div. 407, 46 N. Y. Supp. 590.

[438] Harris v. City of Houston (Tex. Civ. App.) 60 S. W. 440.

[439] Terreri v. Jutte, 159 Pa. 244, 28 Atl. 225.

against another, which together exceed the amount of which a justice has jurisdiction, a judgment recovered on one before a justice is not a bar to an action on the other.[440] Where the plaintiff has two independent accounts against the same defendant, and the latter makes a payment, which the plaintiff credits on one account and sues on the other, and defendant proves that the credit should have been on the account in suit, and obtains a judgment accordingly, such judgment will not operate as a bar to a recovery by plaintiff on the other account.[441]

§ 745. Causes of Action Distinct though Founded on Same Facts.

The rules thus far given mutually limit and explain each other. But the chief difficulty in making a right application of them is found in cases where separate and distinct causes of action are alleged to arise out of the same transaction or state of facts. That such cases do really occur in practice is apparent from even the most cursory review of the authorities. But it is not always easy to extract and formulate the general principles which should govern them. We may say, however, in the first place, that ordinarily a judgment is not conclusive of the rights of the parties which accrue subsequent to the institution of the suit, although they grow out of the same subject-matter.[442] But this must be limited by the rule that for a single and unrepeated act of trespass, or a permanent nuisance, the plaintiff must recover all his damages, present and prospective, in one suit, as already explained.[443]

Again, it by no means follows that two claims are identical, or inseparably connected, because they grow out of the same instru-

[440] Flat Top Grocery Co. v. McClaugherty, 46 W. Va. 419, 33 S. E. 252.

[441] Scott v. Haines (City Ct. N. Y.) 18 N. Y. Supp. 163.

[442] Morrison v. Beckey, 6 Watts (Pa.) 349. Defendant in a forcible detainer suit, having been defeated, took an appeal, giving the usual bond. The appeal was subsequently dismissed and the possession of the premises surrendered, but in the meanwhile rent had accrued in excess of the penalty of the bond. It was held that a recovery upon the appeal bond against the tenant and his surety was not a bar to an action against the tenant for such excess. Chicago Opera-House Co. v. Paquin, 70 Ill. App. 596.

[443] Supra, §§ 738, 743. See Whitney's Adm'r v. Town of Clarendon, 18 Vt. 252, 46 Am. Dec. 150.

ment. A recovery in one action of covenant is no bar to another on the same instrument, claiming for another and distinct breach.[444] Thus, where a lease contained seven distinct and independent covenants, the third of which was to keep the buildings and fences in repair, and the seventh to build 125 rods of fence during the term, it was held that a former action by the lessor, upon the last covenant, for not building the fence, was not a bar to an action subsequently brought upon the covenant to repair, the two covenants being distinct and having no connection with each other, except that they were contained in and evidenced by the same instrument.[445] Yet on recovery of judgment for breach of covenant, no action will lie for other breaches of the same covenant which had occurred when the first action was brought.[446] It may also prove, on examination, that two claims are supported by distinct promises or implied agreements, though growing out of a state of facts apparently homogeneous. Thus, where a railroad passenger having a valise containing apparel and a trunk containing merchandise, of which fact he informed the agent on applying for checks, had paid extra for transportation of the latter, and recovered of the company for loss of the former, it was held that this did not preclude his recovery in a separate action for loss of the latter, evidence thereof having been excluded at the first trial.[447]

In the next place, it often happens that the same transaction or state of facts gives distinct rights of action to or against different persons, or to the parties mutually against each other. For example, a joint judgment obtained by partners in a suit for slander is no

[444] Merchants' Ins. Co. v. Algeo, 31 Pa. 446; Givens v. Peake, 1 Dana (Ky.) 225. See Robinson v. Crowninshield, 1 N. H. 76; Andrew v. Schmitt, 64 Wis. 664, 26 N. W. 190.

[445] McIntosh v. Lown, 49 Barb. (N. Y.) 550. Where one who has no title to land sells it with covenant of warranty, the recovery and satisfaction of a judgment obtained by the vendee against the vendor for the purchase price paid is no bar to an action by the real owner against the vendor for fruits and revenues. City of New Orleans v. Whitney, 138 U. S. 595, 11 Sup. Ct. 428, 34 L. Ed. 1102.

[446] Coggins v. Bulwinkle, 1 E. D. Smith (N. Y.) 434. But see Ullman v. Herzberg, 91 Ala. 458, 8 South. 408.

[447] Millard v. Missouri, K. & T. R. Co., 20 Hun (N. Y.) 191. See, also, Harding v. Hale, 2 Gray (Mass.) 399.

bar to a several suit by one of the partners on the same cause of action. "This action is for a personal injury to the character of the plaintiff, and the former suit was for a joint injury to the trade and business of the firm of D. & K. The members of the firm could have no legal interest whatever in the personal character of each other."[448] Again, where A. sued B. for assault and battery and recovered judgment, which B. paid, and B. subsequently sued A. for an assault and battery on him, committed at the same time and in the same fight, the former judgment was held to be no bar, because non constat but that each might have an independent right of action growing out of the same transaction.[449] So a recovery against a sheriff for money had and received by him in his official capacity is no bar to an action on his bond, against the sureties, for the same money.[450] And a judgment against the principal, on the contract guarantied, will not bar an action against him and another, on the contract of guaranty, executed by both of them jointly.[451]

In the next place, the same act or transaction may give rise to two separate actions of tort, or to one of tort and one of contract. Under some circumstances, the plaintiff will be required to make his election between remedies. But this is not always so; sometimes he may pursue them all to judgment, obtaining, however, only one satisfaction. Thus, a judgment giving actual and exemplary damages for malicious prosecution and for forcibly taking away plaintiff's property, containing the statement that it is not based on the value of the property, will not bar a pending action for the re-

[448] Duffy v. Gray, 52 Mo. 528. An action by a wife for damages to her separate estate is not barred by a judgment in a former action brought by her husband in his own right, upon the same cause of action. San Antonio & A. P. Ry. Co. v. Flato, 13 Tex. Civ. App. 214, 35 S. W. 859. And a judgment in favor of an infant for damages for loss of wages in an action by his father as guardian ad litem is not conclusive against the individual right of the father to recover for the loss of the same services. Lieberman v. Third Ave. R. Co., 55 N. Y. Supp. 677, 25 Misc. Rep. 704.

[449] Cade v. McFarland, 48 Vt. 47.

[450] Treasurers of State v. Oswald's Sureties, 2 Bailey (S. C.) 214.

[451] White v. Smith, 33 Pa. 186, 75 Am. Dec. 589; Fischer v. Quigley, 8 Wash. 327, 35 Pac. 1071. And see Walden Nat. Bank v. Birch, 130 N. Y. 221, 29 N. E. 127, 14 L. R. A. 211.

covery of the property.[452] A judgment in favor of the claimant, on a trial of the right of property in goods seized on execution, is not a bar to an action for the tort committed by taking the property under such execution.[453] A judgment against a carrier for breach of contract in selling the goods, such judgment being for their value but not satisfied, is no bar to an action of trover against the vendee.[454] So also the recovery of judgment on a contract is no bar to a separate action for the deceit originally practised upon the plaintiff to induce him to become a party to it.[455] An action against the vendor upon a warranty in the sale of personal property, in which the plaintiff is defeated on the ground that there was no warranty, is not a bar to an action against the vendor's agent, by whom the sale was made, for fraud therein.[456] And where a note is given for the price of a chattel sold with warranty, a recovery for breach of the warranty does not affect the right to recover on the note.[457] So, judgment for the statutory penalty for illegal overcharge of fare on a railroad will not bar a suit for wrongful ejection from defendant's cars.[458]

Principles similar to those explained with reference to civil issues obtain in criminal cases with equal force. Thus, for example, an

[452] Pishaway v. Runnells, 71 Tex. 352, 9 S. W. 260. See, also, Turner v. Brock, 6 Heisk. (Tenn.) 50; Henson v. Taylor, 108 Ga. 567, 33 S. E. 911. A judgment in an action for conversion of goods is not a bar to an action between the same parties for the price of the same goods. Southern Ry. Co. v. Raney, 117 Ala. 270, 23 South. 29. So, a judgment for plaintiff in an action for the conversion of bonds held by defendant as plaintiff's agent is not a bar to a subsequent action by plaintiff to recover interest on the bonds collected by defendant before the conversion, as defendant's liability to account, as agent, for the interest collected formed no part of the claim for damages for the conversion of the bonds. Govin v. De Miranda, 79 Hun, 329, 29 N. Y. Supp. 347.

[453] Lenoir's Adm'r v. Wilson, 36 Ala. 600. See Inhabitants of Greenfield v. Wilson, 13 Gray (Mass.) 384.

[454] Hyde v. Noble, 13 N. H. 494, 38 Am. Dec. 508.

[455] Wanzer v. De Baun, 1 E. D. Smith (N. Y.) 261; Morgan v. Skidmore, 3 Abb. N. C. (N. Y.) 92; Glaspie v. Keator, 5 C. C. A. 474, 56 Fed. 203; Whittier v. Collins, 15 R. I. 90, 23 Atl. 47. And see Fidelity Insurance, Trust & Safe Deposit Co. v. Gazzam, 161 Pa. 536, 29 Atl. 264.

[456] Gutchess v. Whiting, 46 Barb. (N. Y.) 139.

[457] Trautwein v. Twin City Iron Works, 55 Minn. 264, 56 N. W. 750.

[458] St. Louis & S. F. Ry. Co. v. Trimble, 54 Ark. 354, 15 S. W. 899.

acquittal or conviction on a charge of assault and battery is no bar to a subsequent prosecution for kidnapping, although the two offenses were committed by the same act.[459]

§ 746. Actions on Collateral Securities.

It is a generally accepted rule that an action is not barred by the fact that collateral security was given for the debt sought to be recovered and that the plaintiff has already recovered judgment on such security.[460] Thus a judgment against the indorser of a note only extinguishes and merges the cause of action arising upon his contract of indorsement, leaving in full force the contract obligation of the debtor to pay the debt.[461] So where a creditor receives a draft on a third party, indorsed by the debtor, as collateral, a judgment in favor of the debtor in an action on the draft is not a bar to an action on the debt.[462] The converse of this rule is also good law. The recovery of a judgment against a principal debtor on a note given by him, is no bar to an action against him and another on a note given as collateral security for the debt of the principal, unless such judgment has been satisfied.[463]

§ 747. Successively Arising Causes of Action.

Where several claims, payable at different times, arise out of the same contract or transaction, separate actions may be brought as each liability accrues. But in this case it has been held that if no action is brought until more than one is due, all that are due must be included in one action. And if an action is brought when more

[459] State v. Stewart, 11 Or. 52, 4 Pac. 128. See, also, Methard v. State, 19 Ohio St. 363.

[460] Drake v. Mitchell, 3 East. 251; Fairchild v. Holly, 10 Conn. 475; Chipman v. Martin, 13 Johns. (N. Y.) 240; Bowman v. Humphrey (Ky.) 37 S. W. 150; Hervey v. Rawson, 164 Mass. 501, 41 N. E. 682. Compare Sykes v. Gerber, 98 Pa. 179. See Vanuxem v. Burr, 151 Mass. 386, 24 N. E. 773, 21 Am. St. Rep. 458.

[461] Howell v. McCracken, 87 N. C. 399; Bunker v. Langs, 76 Hun. 543, 28 N. Y. Supp. 210.

[462] Betterton v. Roope, 3 Lea (Tenn.) 215, 31 Am. Rep. 633.

[463] McCullough v. Hellman, 8 Or. 191; White v. Smith, 33 Pa. 186, 75 Am. Dec. 589; Fisher v. Fisher, 98 Mass. 303; Brandt, Sur. 340.

than one is due, a recovery in that suit will be a bar to a second action brought to recover the other claims that were due when the first was brought.[464] Thus, upon a contract of employment at a fixed salary, payable at stated periods, an action and recovery for one of such periods is no bar to a subsequent action to recover salary becoming due subsequent to the commencement of the first action.[465] So a party holding mortgage notes due at different times may institute a suit to foreclose as to only one note, which has fallen due, and a judgment of foreclosure in such a suit, which judgment is paid without a sale of the mortgaged premises, is no bar to a subsequent suit on the mortgage to enforce payment of another of the notes; the notes are so many successive mortgages and causes of action.[466]

The nature of the contract, however, may be such that, instead of a series of actions, only one suit can be brought upon it. And as to the means of determining between these two cases, the authorities leave us in some doubt. In the language of Judge Thompson:[467] "Between the cases in which there may be successive recoveries upon successive claims arising out of the same contract, and those in which a single recovery for a breach puts an end to all further liability on that contract, it is sometimes very difficult to distinguish." Citing an earlier decision of the same court,[468] the learned judge expresses the opinion that "the test question generally is, whether the subsequent suit is for a breach of the same or a different undertaking from that upon which the first suit was maintained. Thus in the case of a lease for a year, with the rent payable monthly, although the contract is a unit, yet there is a separate undertaking for the payment of each month's rent. The lessor, therefore, having recovered judgment for one month's delinquency, may yet sue and recover for the non-payment of a succeeding month's rent. Kerr v. Simmons [9 Mo. App. 376] is itself an illustration of

[464] Union R. & Transp. Co. v. Traube, 59 Mo. 355.

[465] McEvoy v. Bock, 37 Minn. 402, 34 N. W. 740.

[466] Crouse v. Holman, 19 Ind. 30; Bliss v. Weil, 14 Wis. 35, 80 Am. Dec. 768.

[467] Priest v. Deaver, 22 Mo. App. 276.

[468] Kerr v. Simmons, 9 Mo. App. 376.

the other class of cases. The lessee had covenanted for a surrender of the premises at the end of the term, otherwise to pay double rent for every day he should hold over. He held over for one month; thereupon the lessor sued and recovered the double rent for that month. He held over another month, at the expiration of which the lessor sued again. It was held that he could not recover, because the gravamen of the action was, not the several undertaking to pay double rent for each month (which constituted only an agreed measure of damages), but the breach of the single undertaking to surrender possession; and as this breach had been the subject of one recovery, there could not be another for the same cause."[469]

But the principle is well established that a contract to do several things at several times is divisible in its nature, and that an action will lie for the breach of any one of the stipulations, each of these stipulations being considered as a several contract.[470] This doctrine may be made more clear by the citation of a few illustrative cases. Thus, for example, where A. sold ice to B., at so much per ton, to be paid in cash on the delivery of each load, and A. did not exact payment upon delivery, it was held that the several deliveries did not constitute one transaction, and the fact that A. had recovered judgment for some of the ice delivered did not bar him from recovering for ice previously delivered.[471] So where a promissory note

[469] In the case of Bowe v. Minnesota Milk Co., 44 Minn. 460, 47 N. W. 151, it appeared that defendant corporation agreed to buy all of plaintiff's milk during one year, but shortly afterwards the corporation was dissolved by order of court and ceased to do business. Plaintiff sued for damages for failure to buy the milk during three months ensuing the dissolution, and recovered. He brought a second action for damages for such failure for the next three months, and defendant pleaded former recovery. It was held that, as the contract was entire, and its breach total, a single cause of action accrued to plaintiff, upon defendant's dissolution, to recover his whole damages, present and prospective, so that his first action was a bar to any subsequent one. And see Cooke v. Cook, 110 Ala. 567, 20 South. 64.

[470] Badger v. Titcomb, 15 Pick. (Mass.) 409, 26 Am. Dec. 611. In further illustration of these principles, see Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Perry v. Harrington, 2 Metc. (Mass.) 368, 37 Am. Dec. 98; Hanham v. Sherman, 114 Mass. 19; Burritt v. Belfy, 47 Conn. 323, 36 Am. Rep. 79.

[471] Stifel v. Lynch, 7 Mo. App. 326. Where a railroad company, in consideration of the conveyance of a right of way, agrees to use water from a

which, according to its face, runs for several years, contains a proviso that the interest shall be payable annually, and "if the interest is not so paid, the entire principal sum shall immediately become due and payable," the omission to pay the interest for a given year will not operate to render the annual interest thus accrued and unpaid, together with the principal sum, an entire demand, in any such sense as will preclude a recovery for each year's interest as it shall accrue, in successive suits therefor.[472] Again, where one accepts an order to pay a given sum out of the first money of the drawer which he shall receive on account of a certain business, this binds him to pay from time to time, on reasonable request, as the money is received by him, and a judgment recovered against him for a part of the sum, upon demand therefor and refusal, does not bar a subsequent action for a further sum received by him after the commencement of the first action.[473]

Leaving now the special topic of stipulations in a contract to do several things at several times, we may next observe that, as a general rule, a former judgment constitutes no defense to a cause of action accruing, between the same parties and upon the same subject-matter, after its rendition.[474] And by an extension of this

spring on the grantor's land, and pay him therefor by the month, a judgment for damages for failure to pay for such water is no bar to a second suit for failure to make the monthly payments after the rendition of the former judgment. Howe v. Harding, 84 Tex. 74, 19 S. W. 363.

[472] Wehrly v. Morfoot, 103 Ill. 183; Dulaney v. Payne, 101 Ill. 325, 40 Am. Rep. 205; Sparhawk v. Wills, 6 Gray (Mass.) 163. See, also, Andover Sav. Bank v. Adams, 1 Allen (Mass.) 28; Kempner v. Coiner, 73 Tex. 196, 11 S. W. 194. Interest coupons attached to negotiable bonds are distinct and independent promises to pay the interest installments, and a recovery on one is no bar to a suit on another, though the latter was past due when the first action was brought. Butterfield v. Town of Ontario (C. C.) 44 Fed. 171. The fact that a creditor, holding two notes of his debtor given in the same transaction, each being a part of the consideration thereof, sues first on the note maturing last, and recovers a judgment thereon, cannot operate as a bar to a recovery on the note maturing first. Williams v. Kitchen, 40 Mo. App. 604. A recovery of damages for breach of the covenant against incumbrances, the incumbrance being an assessment payable in installments, is not a bar to recovery in a subsequent suit for the damages which have accrued since the former action. Gardner v. Letson, 5 Ohio N. P. 112.

[473] Perry v. Harrington, 2 Metc. (Mass.) 368, 37 Am. Dec. 98.

[474] Jones v. City of Petaluma, 36 Cal. 231; McKissick v. McKissick, 6

principle, when a defendant, who has obtained a judgment in his favor, admits, after the rendition thereof, the justice of the claim sued upon, and promises to pay the same, the former judgment is no bar to an action on such new promise.[475] Every continuation of an illegal imprisonment being a new trespass, a recovery in an action commenced during the continuance of the imprisonment, is no bar to another action brought after it has ceased, for an assault and battery and imprisonment; and if so pleaded, the plaintiff may newly assign, for the continuance of the imprisonment.[476] But a previous suit in trespass, for flowing lands, between the same parties, for the same cause of action, which resulted in a verdict and judgment for the defendant, is a bar to the plaintiff's recovery, unless a different title or different circumstances are shown from those introduced upon the former trial.[477]

§ 748. Breach of Continuing Covenant.

A judgment recovered for a breach of a continuing covenant,—as, to "maintain and keep in repair" a certain structure,—is no bar to a suit for a subsequent breach of the same covenant.[478] But here, as before, we must be careful to distinguish the case of an entire contract such as that a total breach completely ends it and gives a right of action for the whole damages. Thus, in a case in New York, it appeared that, by a contract made in 1822, defendant covenanted that the plaintiff should have a continuous supply of water for his mills from the defendant's dam; that there was a total breach of the covenant in 1826; that in 1835 the plaintiff brought his action for

Humph. (Tenn.) 75; State v. Torinus, 28 Minn. 175, 9 N. W. 725; McCleary v. Malcolm Brewing Co., 56 App. Div. 531, 67 N. Y. Supp. 258; Montrose v. Wanamaker, 57 Hun, 590, 11 N. Y. Supp. 106; Cooper v. City of Brooklyn (City Ct. Brook.) 18 N. Y. Supp. 438; Glaude v. Peat, 43 La. Ann. 161, 8 South. 884; Maize v. Bowman (Ky.) 19 S. W. 589; Underwood v. Smith, 96 Tenn. 687, 27 S. W. 1008, 42 Am. St. Rep. 946; Henderson v. Harness, 184 Ill. 520, 56 N. E. 786; Wagner v. Wagner, 104 Cal. 293, 37 Pac. 935; University of North Carolina v. Maultsby, 55 N. C. 241; Knott v. Stephens, 5 Or. 235.

[475] Cook v. Vimont, 6 T. B. Mon. (Ky.) 284, 17 Am. Dec. 157.

[476] Leland v. Marsh, 16 Mass. 389.

[477] Dick v. Webster, 6 Wis. 481.

[478] Beach v. Crain, 2 N. Y. 86, 49 Am. Dec. 369.

the breach and recovered the damages sustained by him up to that time; and that the present action was for damages accruing since the last named date. It was held that the former recovery was a bar to the maintenance of the suit. Said the chief justice: "He now claims to recover from that time to the commencement of this action, insisting that the covenant is a continuing one, and the liability to performance on the part of the covenantor and his representatives perpetual. I cannot assent to this construction. It is true the covenant stipulated for a continued supply of water to the plaintiff's mills, and in this respect it may be appropriately styled a continuing contract. Yet, like any other entire contract, a total breach put an end to it, and gave the plaintiff a right to sue for an equivalent in damages. He obtained that equivalent, or should have obtained it, in the former suit. To allow a recovery again would be splitting up an entire cause of action, in violation of established principles." [479]

§ 749. Actions for Instalments.

As a general rule, where money is payable by instalments, a distinct cause of action arises upon the falling due of each instalment, and thus they may all be recovered in successive actions; nor will a recovery of one such instalment bar an action for another which falls due after the commencement of the first action.[480] For instance, where a lease stipulates for the payment of rent in monthly or other instalments, a separate right of action accrues to the landlord as each instalment falls due; and while he is bound to include in his demand all the rent that may be due at the time he brings his suit, yet a judgment in his favor in one such action will be no bar to a subsequent suit for rent accruing after the first action

[479] Fish v. Folley, 6 Hill, 54.

[480] Hamm v. Beaver, 31 Pa. 58; Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Ahl v. Ahl, 60 Md. 207; Armfield v. Nash, 31 Miss. 361; Priest v. Deaver, 22 Mo. App. 276; West v. Moser, 49 Mo. App. 201; Near v. Donnelly, 93 Mich. 460, 53 N. W. 616; Raymond v. White, 120 Mich. 165, 78 N. W. 1071; Ramsey County Bldg. Soc. v. Lawton, 49 Minn. 362, 51 N. W. 1163; Doescher v. Doescher, 61 Minn. 326, 63 N. W. 736; Hallack v. Gagnon, 4 Colo. App. 360, 36 Pac. 70; McDougal v. Downey, 45 Cal. 165; Weller v. Henarie, 15 Or. 28, 13 Pac. 614.

was begun.[481] But, under the rule against splitting causes of action, a recovery in an action on a contract which entitles the plaintiff to several sums maturing at different times will be an effectual bar to a second action brought to recover claims that were due when the first action was brought.[482] A recovery in a suit upon a contract for the sale of goods payable in instalments, in which suit the plaintiff counted for an entire sum is a conclusive bar to another suit brought on the same contract to recover a sum which was included in the former declaration.[483] But where the plaintiff sued for two instalments of purchase-money, one of which was due at the institution of the suit, and the other not, and the jury found for the plaintiff a certain sum "due at the institution of the suit," such recovery is not a bar to a subsequent action for the instalment not therein allowed.[484] In covenant for instalments of money, a former recovery between the same parties on the same instrument is no bar, where breaches for the instalments now demanded were not specifically assigned in the former suit, and evidence is admissible to show that the instalments now demanded had not fallen due and were not included in the former recovery.[485]

§ 750. Judgment in One Such Action as Evidence in the Next.

A former judgment for the plaintiff, in one of a series of actions for money due by instalments or other successive causes of action, may be evidence (and conclusive so far as it goes) of the rights of the parties in another of the same series of suits, on the principle that a judgment is final as to all points and questions actually liti-

[481] Holthausen v. Kells, 18 App. Div. 80, 45 N. Y. Supp. 471; Underhill v. Collins, 60 Hun, 585, 15 N. Y. Supp. 495; Stiles v. Himmelwright, 16 Pa. Super. Ct. 649; Webb v. Bailey (Ky.) 33 S. W. 935; Barnes v. Black Diamond Coal Co., 101 Tenn. 354, 47 S. W. 498; Marshall v. John Grosse Clothing Co., 83 Ill. App. 338.

[482] Reformed Protestant Dutch Church of Westfield v. Brown, 54 Barb. (N. Y.) 191; Morrison v. De Donato, 76 Mo. App. 643; Union R. & Transp. Co. v. Traube, 59 Mo. 355; Burritt v. Belfy, 47 Conn. 323, 36 Am. Rep. 79; Jex v. Jacob, 7 Abb. N. C. (N. Y.) 452. Compare Andover Sav. Bank v. Adams, 1 Allen (Mass.) 28.

[483] Corbet v. Evans, 25 Pa. 310.

[484] Kane v. Fisher, 2 Watts (Pa.) 246.

[485] Sterner v. Gower, 3 Watts & S. (Pa.) 136.

gated and determined by it.[486] As the rule is sometimes stated, a judgment for the plaintiff establishes his right to recover upon a like state of facts in a second action.[487] For example, where suit is brought and a judgment recovered for an instalment of rent due under a lease, all questions concerning the validity or terms of the lease, the amount of the rental, the occupancy of the premises, and the like, which were or might have been raised and contested under the issues, are to be regarded as conclusively settled in a subsequent action for another instalment of rent under the same lease.[488] So, where, in an action to recover salary for a part of an unexpired term of plaintiff's employment, it was claimed that the employment was from month to month, and not for a year, which issue was determined in plaintiff's favor, that question cannot be again raised by defendant in a subsequent action for damages accruing subsequent to the first action.[489] For the same reason, if an action is brought upon one of a series of notes, all based upon the same consideration (as, the purchase price of land), and the defendant sets up a defense going to the whole of the original consideration (as, failure of title, an undisclosed incumbrance, or the like), and it is adjudged against him, the judgment will estop him from setting up the same facts in defense to a subsequent suit on another of the notes.[490]

[486] Love v. Waltz, 7 Cal. 250; Haskin v. Mayor, etc., of New York, 11 Hun (N. Y.) 436; Ward v. Sire, 52 App. Div. 443, 65 N. Y. Supp. 101; Lorillard v. Clyde, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470; Hartman v. Pittsburg Incline Plane Co., 11 Pa. Super. Ct. 438; Bond v. Markstrum, 102 Mich. 11, 60 N. W. 282.

[487] Gallagher v. Kingston Water Co., 25 App. Div. 82, 49 N. Y. Supp. 250; Everett v. New York Engraving & Printing Co., 19 Misc. Rep. 360, 43 N. Y. Supp. 502.

[488] Marshall v. John Grosse Clothing Co., 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181; Northwestern Brewing Co. v. Manion, 145 Ill. 182, 34 N. E. 50; Hawkins v. George Ringler & Co., 47 App. Div. 262, 62 N. Y. Supp. 56; Zerega v. Will, 34 App. Div. 488, 54 N. Y. Supp. 361.

[489] Williams v. Luckett, 77 Miss. 394, 26 South. 967.

[490] Trescott v. Barnes, 51 Iowa, 409, 1 N. W. 660; Crompton & Knowles Loom Works v. Brown, 27 Misc. Rep. 319, 57 N. Y. Supp. 823; Gilmore v. Whiteman, 50 Neb. 760, 70 N. W. 364; French v. Howard, 14 Ind. 455; Black River Sav. Bank v. Edwards, 10 Gray (Mass.) 387; Freeman v. Bass, 34 Ga. 355, 89 Am. Dec. 255; De Wolf v. Crandall, 34 N. Y. Super. Ct. 14. Compare Bernard v. Mayor, etc., of City of Hoboken, 27 N. J. Law, 412.

But if the judgment in the first action proceeds upon a ground of defense relating merely to the particular installment in suit, it does not follow that it will be an estoppel in a later suit upon another installment or upon the whole principal sum. Thus, a decision adverse to the defendant, in an action involving the validity of coupons on a bond, given solely on the ground that the plaintiff was an innocent holder for value, does not necessarily estop the defendant from setting up the invalidity of the bond itself in a subsequent action upon it.[491] And although a defendant may have been worsted in his attempt to defend against the first action upon one of a group or series of obligations or installments, this will not prevent him, when sued the second time, from setting up an entirely different defense, which was not presented or considered in the former action, nor necessarily determined against him by implication from the former judgment.[492] If, on the other hand, the defense to the subsidiary claim involves the validity of the principal debt or obligation, the defendant will be concluded by the result. Thus, if he is sued for interest due on his note, and defends on the ground of fraudulent alteration, and judgment is rendered against him, such judgment will estop him from setting up the same defense to an action on the note itself.[493] But in no instance will the former judgment be conclusive unless the parties are the same in the second suit. Thus, if several notes are given for the same consideration, in the same transaction, and pass by negotiation into the hands of different parties, and the maker, in a suit on one of the notes brought by its holder, unsuccessfully attempts to defend on a plea of failure of

[491] Nesbit v. Independent School Dist. (C. C.) 25 Fed. 635. A judgment in favor of a bondholder upon certain interest coupons is not conclusive of the validity of other interest coupons on the same bonds, where such judgment is rendered upon no other evidence than the coupons themselves, no defense being made to the suit. Skinner v. Franklin Co., 6 C. C. A. 118, 56 Fed. 783. Judgment against a county on coupons from its bonds is not conclusive as to the validity of the bonds in an action by another plaintiff on the bonds. Shell v. Carter Co. (Tenn. Ch. App.) 42 S. W. 78.

[492] Stone v. St. Louis Stamping Co., 155 Mass. 267, 29 N. E. 623; Louisville Trust Co. v. Drennon Springs Co. (Ky.) 34 S. W. 1072; Richardson v. City of Eureka, 110 Cal. 441, 42 Pac. 965.

[493] Edgell v. Sigerson, 26 Mo. 583.

consideration, this will not estop him from setting up a like defense to a similar action by the holder of another of the notes.[494]

It is by no means certain that these principles apply where the former judgment was taken by default. For a default, as we have already seen,[495] admits only the material facts well pleaded in the declaration. It has been held that a judgment by default upon one of a series of promissory notes, founded upon one and the same illegal consideration,—no issue upon the fact of consideration being tendered by the complaint,—does not preclude the defendant from setting up, in a second action, upon another of the notes, the defense of illegality of consideration.[496] But this view does not find favor in some of the states, particularly New York.[497]

It is also very necessary to distinguish carefully between cases where the two causes of action are vitally allied and grow out of the same transaction, and cases where they are really distinct and independent, having no such inner connection, though they may be characterized by a certain similarity or consecutiveness. This principle is illustrated by the rule that a decision in a suit concerning the taxes of one year is not res judicata in regard to the taxes of another year, notwithstanding the same contention is involved.[498] Thus, an injunction against a municipal corporation, prohibiting it from collecting taxes levied for one year, will not necessarily bar a suit to recover taxes levied on the same property for a subsequent year, though the same defense is interposed.[499] "Each year's taxes

[494] Dodd v. Mayfield, 90 Ga. 319, 25 S. E. 698.

[495] Supra, § 697.

[496] Adams v. Adams, 25 Minn. 72; Hughes v. Alexander, 5 Duer, 488.

[497] Newton v. Hook, 48 N. Y. 676; Crompton & Knowles Loom Works v. Brown, 28 Misc. Rep. 513, 59 N. Y. Supp. 556; O. Graham & Sons Co. v. Van Horn (Sup.) 49 N. Y. Supp. 401.

[498] Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; Mercantile Nat. Bank v. Hubbard (C. C.) 98 Fed. 465; Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 South. 200; State v. Jumel, 30 La. Ann. 861; State v. Citizens' Bank of Louisiana, 52 La. Ann. 1086, 27 South. 709; Shuck v. City of Lebanon (Ky.) 53 S. W. 655; City of Newport v. Com. (Ky.) 50 S. W. 845, 45 L. R. A. 518; Union & Planters' Bank v. City of Memphis, 101 Tenn. 154, 46 S. W. 557.

[499] City of Davenport v. Chicago, R. I. & P. R. Co., 38 Iowa, 633; Buchanan v. Springer (Tenn. Ch. App.) 35 S. W. 774; Third Nat. Bank v. Stone, 174 U. S. 432, 19 Sup. Ct. 759, 43 L. Ed. 1035.

constitute a distinct and separate cause of action, and the determination of the matters involved in the injunction suit reached no further than the taxes of the year then in question. . . . . The taxes of separate years do not in any just sense grow out of the same transaction. They are like distinct claims on two different promissory notes made upon two distinct and separate, though similar, transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties." [500] But the doctrine of the United States supreme court appears to be that a judgment in an action for taxes is (like any other) conclusive between the parties upon any fact or contention actually litigated and decided. Thus a judgment enjoining the collection of a tax against a bank for a particular year, on the ground that its charter exempts it from taxation, is conclusive as to the right to the exemption for future years, where it is claimed upon identically the same facts.[501] And in a case in Illinois, where the validity of an assessment of taxes against a part of a railroad bridge was questioned on the ground that the property was not situated within the state, and the court determined that it was so situated, it was held that that question was res judicata on a proceeding between the same parties to determine the validity of a subsequent assessment of the same property.[502]

§ 751. Successful Defense to One of a Series of Actions.

The converse of the rule stated in the last section is equally true. A successful defense to one of a series of actions founded on the same transaction or subject-matter, if it went to the merits of the whole, is a complete estoppel in any subsequent actions of the

[500] City of Davenport v. Chicago, R. I. & P. R. Co., 38 Iowa, 633.

[501] City of New Orleans v. Citizens' Bank of Louisiana, 167 U. S. 371, 17 Sup. Ct. 905, 42 L. Ed. 202 (compare Third Nat. Bank v. Stone, 174 U. S. 432, 19 Sup. Ct. 759, 43 L. Ed. 1035; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450); Hancock v. Singer Mfg. Co., 62 N. J. Law, 289, 41 Atl. 846, 42 L. R. A. 852; St. Joseph & G. I. R. Co. v. Steele, 11 C. C. A. 470, 63 Fed. 867.

[502] Keokuk & H. Bridge Co. v. People, 185 Ill. 276, 56 N. E. 1049.

series.[503] "If it appears that the first judgment involved the whole claim or extended to the whole subject-matter, and settled the entire defense to the whole of a series of notes or claims, and adjudicated the whole subject-matter of a defense equally relevant to and conclusive of the controversy between the parties, as well in respect of the claim or defense in judgment as in respect to other claims and defenses thereto, pertaining to the same transaction or subject-matter, then the first judgment operates as an estoppel as to the whole. Unless, however, it is made to appear that the defenses pleaded to the first claim or demand involved the whole title, or extended to the whole subject-matter of the controversy between the parties, so as to litigate and determine the defendant's liability in respect to the whole transaction, then the judgment is a finality only as to so much of the claims and defenses as were actually litigated in the first suit." [504] Thus a final judgment for the defendant in an action against a municipal corporation to recover on coupons attached to bonds purporting to have been issued by the corporation, entered on demurrer to an answer setting up facts showing that the bonds were never executed by the municipality, concludes the plaintiff in a subsequent action against the same defendant to recover on other coupons cut from the same bonds.[505] So where,

[503] Cromwell v. Sac Co., 94 U. S. 351, 24 L. Ed. 195; Bouchaud v. Dias, 3 Denio (N. Y.) 238; Burdick v. Cameron, 10 App. Div. 589, 42 N. Y. Supp. 78; Coyle v. Ward, 36 App. Div. 181, 55 N. Y. Supp. 388; Danziger v. Williams, 91 Pa. 234; Rake's Adm'r v. Pope, 7 Ala. 161; Hanrick v. Gurley, 93 Tex. 458, 56 S. W. 330; Furneaux v. First Nat. Bank of Whitewater, 39 Kan. 144, 17 Pac. 854, 7 Am. St. Rep. 541; Peru Plow & Wheel Co. v. Ward, 6 Kan. App. 289, 51 Pac. 805; Goble v. Dillon, 86 Ind. 327, 44 Am. Rep. 308; Felton v. Smith, 88 Ind. 149, 45 Am. Rep. 454; Markley v. People, 171 Ill. 260, 49 N. E. 502, 63 Am. St. Rep. 234; Goodenow v. Litchfield, 59 Iowa, 226, 13 N. W. 86; Hazen v. Reed, 30 Mich. 331; Rio Grande W. Ry. Co. v. Telluride Power Transmission Co. (Utah) 63 Pac. 995.

[504] Kilander v. Hoover, 111 Ind. 10, 11 N. E. 796. And see Augir v. Ryan, 63 Minn. 373, 65 N. W. 640; Hoover v. Kilander, 135 Ind. 600, 34 N. E. 697. In an action to recover an assessment on the stock of a corporation, a decision that the cause of action was barred by the statute of limitations is no bar to a subsequent action between the same parties to recover a subsequent assessment. Priest v. Glenn, 4 U. S. App. 569, 2 C. C. A. 311, 51 Fed. 405.

[505] Bissell v. Spring Valley Tp., 124 U. S. 225, 8 Sup. Ct. 495, 31 L. Ed. 411; Edwards v. Bates County (C. C.) 55 Fed. 436.

in the course of a single transaction, an agent, under a mistaken belief that he was required, by his contract with his principals, to guaranty notes taken by him in their favor, indorsed three such notes as surety, it was held that a judgment in his favor, upon the ground of such mistake, in an action upon one of the notes, was decisive of his liability upon the others, and that as the mistake was common to all, the matter was res judicata.[506]

§ 752. Suits for Wages.

If a servant or agent wrongfully dismissed from service elects to sue for the breach of contract, before the termination of the period for which he was hired, and recovers, such recovery will be a bar to any subsequent action on the same contract.[507] "A servant unlawfully discharged may treat the contract as rescinded and sue on a quantum meruit for services actually rendered, or he may bring his action for damages for breach of contract. He may wait to do this until the term is ended, and recover his actual damages, or he may sue at once and recover his probable damages from the breach. But when he has elected his remedy and pursued it, a judgment in one action will be a bar to a further suit. . . . . If the discharged servant brings his action before the measure of damages has been filled, or before the damages have been all known, it is his folly or his misfortune. He cannot sever them, and recover part in one action and the residue, when discovered, in another."[508] Some of the authorities maintain that an employé who is engaged for a stipulated time, for wages or salary payable in installments,

[506] Aultman v. Mount, 62 Iowa, 674, 18 N. W. 306.

[507] Dunn v. Murray, 9 Barn. & C. 780; Alle v. Nadeau, 93 Me. 282, 44 Atl. 891, 74 Am. St. Rep. 346; Landsberg v. Lewis, 22 Abb. N. C. 277, 6 N. Y. Supp. 561; Wieland v. Willcox, 40 App. Div. 213, 57 N. Y. Supp. 1038; Waldron v. Hendrickson, 40 App. Div. 7, 57 N. Y. Supp. 561; Eisenhower v. School Dist. of Borough of Centralia, 13 Pa. Super. Ct. 51; Olmstead v. Bach, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273; Liddell v. Chidester, 84 Ala. 508, 4 South. 426, 5 Am. St. Rep. 387; Richardson v. Eagle Mach. Works, 78 Ind. 422, 41 Am. Rep. 584; Weill v. Fontanel, 31 Ill. App. 615; Monarch Cycle Mfg. Co. v. Mueller, 83 Ill. App. 359; Booge v. Pacific R. R., 33 Mo. 212, 82 Am. Dec. 160; Kahn v. Kahn, 24 Neb. 709, 40 N. W. 135.

[508] Soursin v. Salorgne, 14 Mo. App. 486.

and who is wrongfully discharged before the expiration of the term, may thereafter bring a separate suit for each installment on the day it would have fallen due had the contract remained in force, and as if such installment had been actually earned; and the recovery in one such suit will not bar the actions for subsequent installments.[509] But this theory is not consistent with the rules above stated and is opposed to the great preponderance of the decisions. The better doctrine is that the employé, in such a case, has but one remedy, namely, an action for damages for the breach of the contract, and his recovery must be limited to one action brought thereon.[510] But a judgment for damages for wrongful dismissal of plaintiff from defendant's employment will not bar a subsequent action to recover wages earned during the time plaintiff was actually employed, and due and payable before the dismissal, the two claims constituting separate and independent causes of action.[511]

§ 753. Plaintiff can have but one Satisfaction.

In connection with the subject of recurring liabilities, continuing damages, successive rights of action founded on the same transaction or state of facts, and the like, it is important to remember that the plaintiff can have no more than one full satisfaction for his whole demand. For example, where, upon a submission to arbitration, defendant gives a bond in a sum agreed on as stipulated damages, conditioned to abide by the award, and the arbitrators find in favor of the plaintiff, the latter has his election whether to sue on the bond or on the award; but if he sues on the award and recovers, the bond is thereby satisfied and cannot be made the basis of a new suit.[512] So where plaintiff's goods were attached as the debtor's property, and in the special statutory action which plaintiff brought

[509] Gandell v. Pontigny, 4 Camp. 375 (but compare Goodman v. Pocock, 15 Q. B. 576); Williams v. Luckett, 77 Miss. 394, 26 South. 967; Levin v. Standard Fashion Co., 16 Daly, 404, 11 N. Y. Supp. 706; Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8.

[510] See Parry v. American Opera Co., 19 Abb. N. C. (N. Y.) 269; James v. Allen County, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821.

[511] Perry v. Dickerson, 85 N. Y. 345, 39 Am. Rep. 663.

[512] Nolte v. Lowe, 18 Ill. 437. See, also, Peerce v. Athey, 4 W. Va. 22; Bird v. Randall, 1 W. Bl. 373.

in the course of a single transaction, an agent, under a mistaken belief that he was required, by his contract with his principals, to guaranty notes taken by him in their favor, indorsed three such notes as surety, it was held that a judgment in his favor, upon the ground of such mistake, in an action upon one of the notes, was decisive of his liability upon the others, and that as the mistake was common to all, the matter was res judicata.[506]

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[508] Soursin v. Salorgne, 14 Mo. App. 486.

and who is wrongfully discharged before the expiration of the term, may thereafter bring a separate suit for each installment on the day it would have fallen due had the contract remained in force, and as if such installment had been actually earned; and the recovery in one such suit will not bar the actions for subsequent installments.[509] But this theory is not consistent with the rules above stated and is opposed to the great preponderance of the decisions. The better doctrine is that the employé, in such a case, has but one remedy, namely, an action for damages for the breach of the contract, and his recovery must be limited to one action brought thereon.[510] But a judgment for damages for wrongful dismissal of plaintiff from defendant's employment will not bar a subsequent action to recover wages earned during the time plaintiff was actually employed, and due and payable before the dismissal, the two claims constituting separate and independent causes of action.[511]

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seaworthiness of the vessel. This point, however, had been litigated and finally decided against the defendants, in an action brought by the defendants as libelants against the plaintiffs. It was held that this adjudication was binding upon the parties, and the issue could not be again raised.[518] So, a judgment in an action on a marine policy covering the owner's loss of freight is conclusive, in a subsequent action between the same parties on a policy covering the loss of the vessel, as to every defense open and available to the insurer in the first action, whether actually litigated or not.[519] A judgment for the plaintiff in an action on a contract which, by its terms, was not to be performed in a year, is conclusive between the parties as to the validity of the contract, though the statute of frauds was not pleaded.[520] In proceedings to compel a county official to issue warrants in payment of a judgment against the county, defendant is estopped to plead that the indebtedness on which the judgment was based was in excess of the constitutional debt limit of the county.[521] So where a plaintiff who has contracted to do work for a city sues for the balance due him, it is a proper ground of defense for the city that claims for labor and material, against which he had undertaken to secure the city by giving a bond, remain unpaid; and if he recovers a judgment, the city cannot afterwards maintain an action on such bond.[522] Again, an order authorizing a railway company to take possession of land under proceedings in eminent domain is conclusive of all matters relied on by the owner for a recovery of the land at the time such order was issued.[523] In a case in Ohio, it is said that where an assessment is imposed on a city lot to pay the cost of improving a street upon which it abuts, and the owner thereof, having two distinct grounds for contesting the validity of such assessment, one of which is common to him and the owners of all the other abutting lots, and the other pertaining to his lot only, elects to bring an action for the benefit of himself and the other abutting owners to enjoin its col-

[518] Woodhouse v. Duncan, 106 N. Y. 527, 13 N. E. 334.
[519] McLaughlin v. Great Western Ins. Co. (Com. Pl.) 20 N. Y. Supp. 536.
[520] Foulke v. Thalmessinger, 158 N. Y. 725, 53 N. E. 1125.
[521] State v. Gloyd, 14 Wash. 5, 44 Pac. 103.
[522] City of Lancaster v. Frescoln, 192 Pa. 452, 43 Atl. 961.
[523] Muhle v. New York, T. & M. Ry. Co., 86 Tex. 459, 25 S. W. 607.

lection, the judgment rendered therein is a bar to a second action brought by him alone, in which the assessment is attacked on the grounds which pertained to his lot only; and this is so, although the grounds on which the first action was founded would, if maintained, have totally defeated the assessment, while the grounds set forth in the second action would simply have reduced the amount that had been assessed against the plaintiff's lot.[524]

A very strong illustration of the application of the general rule on this subject is afforded by the case of Homer v. Fish.[525] It there appeared that the defendants procured the plaintiff to insure a vessel for them, upon which there was a loss. They sued him and recovered judgment for the amount of the loss and obtained satisfaction upon execution. He afterwards commenced an action against them to recover back the money, upon the ground that they knew of the loss at the time the insurance was made, but concealed the knowledge of it from him, and that the fraud was not discovered until after the execution was satisfied. Nevertheless it was held that the former judgment was a bar to the present action; because the fraud was matter which could have been pleaded in defense to the action on the policy. By an extension of the same principle, where facts are pleaded in defense to an action, and a final judgment rendered therein necessarily deciding the merits of such defense, the same facts cannot thereafter be made the basis of an action between the same parties arising out of the same transaction, although in the former suit the facts were pleaded as a defense only and no claim made thereon for affirmative relief.[526] And if a defense is set up in an action which is good and sufficient and should legally be allowed, but the same is improperly rejected by the court and judgment goes against the defendant, he is bound by the decision, and his relief from it should be sought, not by a new suit on the subject-matter of the defense, or by an attempt to re-litigate the matter in another action, but by a correction of that error in the same suit.[527]

[524] City of Cincinnati v. Emerson, 57 Ohio St. 132, 48 N. E. 667.
[525] 1 Pick. (Mass.) 435, 11 Am. Dec. 218.
[526] Bierer v. Fretz, 37 Kan. 27, 14 Pac. 558.
[527] Collins v. Bennett, 46 N. Y. 490.

§ 755. Same; Adverse Title.

On the principle that one is bound to bring forward all his available defenses at a proper opportunity, it is held that in a petitory action the defendant must plead all the titles under which he claims to be owner, and a final judgment rendered in favor of the plaintiff may be pleaded as res judicata against any title which the defendant was possessed of at the time but omitted to plead.[528] Thus, a recovery by the plaintiff in an action to quiet title, or in partition, or in trespass to try title, is conclusive as against every title to the disputed property which the defendant had at the time of the trial.[529] So when, in a suit involving title to a large tract of land, judgment is recovered, the unsuccessful party cannot, in a subsequent proceeding, litigate his right against the successful party to a homestead on a portion of the land, claim to which as a homestead had not been asserted in the first suit.[530] For similar reasons, a judgment foreclosing a mortgage cannot be collaterally attacked by showing that the land, at the time of the execution of the mortgage, and at the foreclosure thereof, was the homestead of the mortgagor.[531] And in a suit against a judgment debtor and his two grantees to subject lands alleged to have been fraudulently conveyed, the grantees are bound to set up all the defenses they have; and after a decree for complainant, one of them cannot, by a subsequent suit, assert title to a part of the lands as a bona fide purchaser from the other, under a deed which he had received before the first suit was begun and which he failed to bring forward therein.[532]

[528] Shaffer v. Scuddy, 14 La. Ann. 575.

[529] Root v. Woolworth, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123; Simpson v. Dugger, 88 Va. 963, 14 S. E. 760; Caston v. Perry, 1 Bailey (S. C.) 533, 21 Am. Dec. 482; McCray v. Freeman, 17 Tex. Civ. App. 268, 43 S. W. 37; Pierson v. Conley, 95 Mich. 619, 55 N. W. 387; Flynn v. Hite, 107 Cal. 455, 40 Pac. 749.

[530] Nichols v. Dibrell, 61 Tex. 539. And see Dodd v. Scott, 81 Iowa, 319, 46 N. W. 1057, 10 L. R. A. 360, 25 Am. St. Rep. 492.

[531] Beer v. Thomas, 13 Tex. Civ. App. 30, 34 S. W. 1010. Compare Provident Loan Trust Co. v. Marks, 6 Kan. App. 34, 49 Pac. 625.

[532] Dowell v. Applegate, 152 U. S. 327, 14 Sup. Ct. 611, 38 L. Ed. 463.

§ 756. Same; Fraud.

Fraud, tainting the plaintiff's cause of action, is a defense which the defendant is bound to set up when he has an opportunity to do so; and if he neglects to avail himself of this means of defeating the claim made against him, he will be precluded by the judgment from afterwards alleging such fraud.[533] Thus, a judgment at law rendered upon an account stated is conclusive of the fairness of the account, since fraud in obtaining it could have been set up as a defense.[534] So, proceedings having been taken for the foreclosure of a mortgage and a decree made, the question of fraud in the execution of the mortgage and of payment thereof are concluded, whether those considerations were actually brought before the court by way of defense or not; because any matter necessarily involved in the adjudication, whether raised or not, is concluded "and especially so if the party denying the adjudication knew of the matter and could have interposed it at the previous trial, either in support of a claim or as a defense." [535] Evidence that a mortgage and bond had been procured through fraud is not admissible in an ejectment for property sold under the mortgage, when the same defense had been ineffectually set up in a prior scire facias on the mortgage and on a rule to open the judgment entered on the bond.[536]

§ 757. Same; Agreement to Compromise.

It is held that a debtor, with whom his creditor has agreed to compromise on certain conditions, who fails to set up that agreement, after the conditions are performed, in an action on the debt, and suffers judgment for the full amount, is not estopped to sue on the agreement, since that was collateral, and, being merely executory,

[533] Rauwolf v. Glass, 184 Pa. 237, 39 Atl. 79; Royston v. Horner, 86 Md. 249, 37 Atl. 718, 63 Am. St. Rep. 510; McMullen v. Ritchie (C. C.) 64 Fed. 253; Pettus v. Smith, 4 Rich. Eq. (S. C.) 197. Compare Arnold v. Norfolk & N. B. Hosiery Co., 63 Hun, 176, 17 N. Y. Supp. 646.

[534] Edmanson v. Best, 6 C. C. A. 471, 57 Fed. 531.

[535] Ruff v. Doty, 26 S. C. 173, 1 S. E. 707, 4 Am. St. Rep. 709. See, also, Flint v. Bodge, 10 Allen (Mass.) 128.

[536] Lewis v. Nenzel, 38 Pa. 222.

could not operate as a payment or satisfaction pro tanto of the debt.[537] But on the other hand, where a creditor agrees in writing to accept from his debtors a less sum than is actually due, and then assigns the entire debt, and the debtors, though aware of the assignment, consent to the entry of judgment against them in favor of the assignee for such entire amount, and there is proof that they so consented in order to prevent other creditors from attaching, they cannot afterwards fall back on the agreement with their creditor to defeat the rights of the assignee.[538]

§ 758. Same; Payment.

There are some few cases in the reports in which it has been adjudged that, after a judgment by default for the full amount of a debt, the defendant might maintain an action to recover back partial payments which were not set up or credited in the former suit.[539] But these decisions have been overruled.[540] And it is now fully settled upon the authorities that a partial payment, like any other defense, must be set up at the proper time or else be forever concluded by the judgment; and if a defendant omits to plead and insist upon such a payment, when he has a legal opportunity so to do, but suffers judgment to be taken for the whole original amount, he can never afterwards maintain a suit against his original creditor for the amount of the payment.[541] Thus a judgment by

[537] Hunt v. Brown, 146 Mass. 253, 15 N. E. 587.

[538] Smith v. Chilton, 84 Va. 840, 6 S. E. 142. And see Henderson v. Moss, 82 Tex. 69, 18 S. W. 555.

[539] Smith v. Weeks, 26 Barb. (N. Y.) 463; Rowe v. Smith, 16 Mass. 306; Fowler v. Shearer, 7 Mass. 14.

[540] Binck v. Wood, 43 Barb. (N. Y.) 315; Fuller v. Shattuck, 13 Gray (Mass.) 70, 74 Am. Dec. 622; Sacket v. Loomis, 4 Gray (Mass.) 148.

[541] Cadaval v. Collins, 4 Adol. & E. 858, 867; Fuller v. Eastman, 81 Me. 284, 17 Atl. 67; Tilton v. Gordon, 1 N. H. 33; Corey v. Gale, 13 Vt. 639; Baker v. Stinchfield, 57 Me. 363; Loring v. Mansfield, 17 Mass. 394; Loomis v. Pulver, 9 Johns. (N. Y.) 244; Binck v. Wood, 43 Barb. (N. Y.) 315; Walker v. Ames, 2 Cow. (N. Y.) 428; Weiser v. Weiser (Sup.) 53 N. Y. Supp. 578; In re Lawrence's Estate, 169 Pa. 185, 32 Atl. 406; Davis v. Murphy, 2 Rich. Law (S. C.) 560, 45 Am. Dec. 749; Broughton v. McIntosh, 1 Ala. 103; Mitchell v. Sanford, 11 Ala. 695; Bobe's Heirs v. Stickney, 36 Ala. 482; Williams v. Jones, 10 Smedes & M. (Miss.) 108; Kirklan v. Brown's Adm'rs, 4 Humph. (Tenn.) 174, 40 Am. Dec. 635; Wright v. Leclaire, 3 Iowa, 221; Doyle v. Reilly, 18

default in a summary proceeding against a tax-collector and the sureties on his official bond, is conclusive as to the amount then due from the collector to the state, and neither he nor the sureties can, in any future litigation with the state, claim credits which might have been set up in defense of that suit.[542] So where judgment has been recovered on a note for its full amount, the debtor is precluded by the judgment from maintaining an action to recover back the illegal interest which he alleges to have been included in the note.[543] We must here call attention to a case decided in Wisconsin,[544] wherein it is attempted to draw a distinction which, if sound, would materially modify the application of the above rule. In the case referred to it appeared that a sum of money had been delivered by the obligor of a bond to the obligee, to be credited by the latter upon the bond as a part payment, but the obligee neglected to indorse or apply the payment, and afterwards sued for and recovered from the obligor the whole amount of the bond. It was held that he was liable to the obligor in an action for money had and received for the amount so delivered to him and which he failed to apply upon the bond. The court admitted that if the obligor had set up such part payment as a defense in an action on the bond, and had failed to sustain it, for want of proof or other cause, he could not afterwards recover the amount back, but they thought the circumstances made this case different. They announced as the rule: "Where the prosecution of an action will impeach a former judgment, it cannot be maintained; but where the claim does not impeach the former judgment, but arises out of the fraud, breach of trust, or neglect of the party, the action may be maintained." The circumstances, however, seem to be scarcely sufficient to except a case of this character from the general, salutary, and well-established rule.

Iowa, 108, 85 Am. Dec. 582; Greenabaum v. Elliott, 60 Mo. 25; 1 Whart. Ev. § 789.

[542] State v. McBride, 76 Ala. 51.

[543] Footman v. Stetson, 32 Me. 17, 52 Am. Dec. 634.

[544] Woodward v. Hill, 6 Wis. 143.

in the course of a single transaction, an agent, under a mistaken belief that he was required, by his contract with his principals, to guaranty notes taken by him in their favor, indorsed three such notes as surety, it was held that a judgment in his favor, upon the ground of such mistake, in an action upon one of the notes, was decisive of his liability upon the others, and that as the mistake was common to all, the matter was res judicata.[506]

§ 752. Suits for Wages.

If a servant or agent wrongfully dismissed from service elects to sue for the breach of contract, before the termination of the period for which he was hired, and recovers, such recovery will be a bar to any subsequent action on the same contract.[507] "A servant unlawfully discharged may treat the contract as rescinded and sue on a quantum meruit for services actually rendered, or he may bring his action for damages for breach of contract. He may wait to do this until the term is ended, and recover his actual damages, or he may sue at once and recover his probable damages from the breach. But when he has elected his remedy and pursued it, a judgment in one action will be a bar to a further suit. . . . . If the discharged servant brings his action before the measure of damages has been filled, or before the damages have been all known, it is his folly or his misfortune. He cannot sever them, and recover part in one action and the residue, when discovered, in another."[508] Some of the authorities maintain that an employé who is engaged for a stipulated time, for wages or salary payable in installments,

[506] Aultman v. Mount, 62 Iowa, 674, 18 N. W. 306.

[507] Dunn v. Murray, 9 Barn. & C. 780; Alle v. Nadeau, 93 Me. 282, 44 Atl. 891, 74 Am. St. Rep. 346; Landsberg v. Lewis, 22 Abb. N. C. 277, 6 N. Y. Supp. 561; Wieland v. Willcox, 40 App. Div. 213, 57 N. Y. Supp. 1038; Waldron v. Hendrickson, 40 App. Div. 7, 57 N. Y. Supp. 561; Eisenhower v. School Dist. of Borough of Centralia, 13 Pa. Super. Ct. 51; Olmstead v. Bach, 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273; Liddell v. Chidester, 84 Ala. 508, 4 South. 426, 5 Am. St. Rep. 387; Richardson v. Eagle Mach. Works, 78 Ind. 422, 41 Am. Rep. 584; Weill v. Fontanel, 31 Ill. App. 615; Monarch Cycle Mfg. Co. v. Mueller, 83 Ill. App. 359; Booge v. Pacific R. R., 33 Mo. 212, 82 Am. Dec. 160; Kahn v. Kahn, 24 Neb. 709, 40 N. W. 135.

[508] Soursin v. Salorgne, 14 Mo. App. 486.

and who is wrongfully discharged before the expiration of the term, may thereafter bring a separate suit for each installment on the day it would have fallen due had the contract remained in force, and as if such installment had been actually earned; and the recovery in one such suit will not bar the actions for subsequent installments.[509] But this theory is not consistent with the rules above stated and is opposed to the great preponderance of the decisions. The better doctrine is that the employé, in such a case, has but one remedy, namely, an action for damages for the breach of the contract, and his recovery must be limited to one action brought thereon.[510] But a judgment for damages for wrongful dismissal of plaintiff from defendant's employment will not bar a subsequent action to recover wages earned during the time plaintiff was actually employed, and due and payable before the dismissal, the two claims constituting separate and independent causes of action.[511]

§ 753. Plaintiff can have but one Satisfaction.

In connection with the subject of recurring liabilities, continuing damages, successive rights of action founded on the same transaction or state of facts, and the like, it is important to remember that the plaintiff can have no more than one full satisfaction for his whole demand. For example, where, upon a submission to arbitration, defendant gives a bond in a sum agreed on as stipulated damages, conditioned to abide by the award, and the arbitrators find in favor of the plaintiff, the latter has his election whether to sue on the bond or on the award; but if he sues on the award and recovers, the bond is thereby satisfied and cannot be made the basis of a new suit.[512] So where plaintiff's goods were attached as the debtor's property, and in the special statutory action which plaintiff brought

[509] Gandell v. Pontigny, 4 Camp. 375 (but compare Goodman v. Pocock, 15 Q. B. 576); Williams v. Luckett, 77 Miss. 394, 26 South. 967; Levin v. Standard Fashion Co., 16 Daly, 404, 11 N Y. Supp. 706; Strauss v. Meertief, 64 Ala. 299, 38 Am. Rep. 8.

[510] See Parry v. American Opera Co., 19 Abb. N. C. (N. Y.) 269; James v. Allen County, 44 Ohio St. 226, 6 N. E. 246, 58 Am. Rep. 821.

[511] Perry v. Dickerson, 85 N. Y. 345, 39 Am. Rep. 663.

[512] Nolte v. Lowe, 18 Ill. 437. See, also, Peerce v. Athey, 4 W. Va. 22; Bird v. Randall, 1 W. Bl. 373.

of the action, the defendant must present it as a set-off, or forfeit his right to claim relief upon it.[551] But difficulty would sometimes arise in cases where the amount claimed in set-off exceeded the jurisdiction of the court—e. g., a justice's court—in which the action was brought. Here the statutes do not impose this limitation upon the defendant's rights except in regard to cross-claims on which an independent suit might have been maintained in the same court.[552] In some other states, while the common law rule has not been abrogated, yet, with a view to consolidating litigation as much as possible, the statutes provide that a party shall not be entitled to costs when he recovers on a cause of action which he might have used as a set-off in a former suit. But for the most part the rule still subsists as above stated. It has been said that the law will presume that matters of set-off to a judgment, which occurred before its rendition, were included in the judgment, though such presumption may be removed by proof to the contrary.[553] But probably this statement must be restricted to cases in which the matter of set-off grew out of the same transaction or state of facts with the plaintiff's demand, and was so intimately connected therewith that its examination would seem to have been necessary to a thorough investigation of the cause of action stated.

It is a matter of course that if the defendant does present his claim by way of set-off, then, whether it is allowed or found against him, he cannot afterwards use it as a separate cause of action. And conversely, if one sues on a given demand and is defeated, he cannot afterwards plead the same demand in set-off.[554] But it appears that if a fact or state of facts be set up in the first action merely as a defense, and not as the foundation of a claim for affirmative relief, this will not prevent the same from being used as a counterclaim in a subsequent suit. Thus, in a recent case in Minnesota, a chattel

[551] See Code Civ. Proc. Cal. §§ 438, 439; Code Civ. Proc. N. Y. § 2947; Davis v. Alkin, 85 Hun, 554, 33 N. Y. Supp. 103; Weiser v. Kling, 38 App. Div. 266, 57 N. Y. Supp. 48; Rev. St. Tex. arts. 649, 650; Fitzhugh v. McKinney (C. C.) 43 Fed. 461.

[552] Herring v. Adams, 5 Watts & S. 459; Code Civ. Proc. Cal. §§ 855, 856.

[553] Carter v. Hanna, 2 Ind. 45.

[554] Campbell v. Mayhugh, 15 B. Mon. (Ky.) 142; Litch v. Clinch, 136 Ill. 410, 26 N. E. 579.

mortgage was given to secure two promissory notes; the mortgagee sued the mortgagor to recover possession of the mortgaged property; the defendant alleged, as a defense only, that there was a failure of consideration for the notes and mortgage, and the verdict was in his favor. It was held that this was no bar to a counterclaim based on such failure of consideration, in an action on the notes brought by the same plaintiff against the same defendant.[555] Again, some of the authorities countenance the view that some of the items of a counterclaim may be withheld from consideration, and afterwards used as a cause of action or set-off. According to the court in Maine, judgment in a suit wherein a set-off account has been filed is conclusive upon that account, unless some of its items had been previously withdrawn. "But if an adjustment took place between the parties and a writing was executed by them showing the mode of adjustment, and items charged in the account in set-off were expressly excluded, and judgment was rendered accordingly, it was a withdrawal of such items." [556]

§ 762. Submission of All Matters in Difference.

In case of a submission to arbitration of "all matters in difference" between the parties, the more reasonable view is that both parties are required to bring forward all their claims and demands against each other, and neither is at liberty to reserve any available claim or demand to be afterwards used as a set-off or cause of action. On this point Lord Ellenborough expressed himself as follows: "Here is a reference of all matters in difference, and it appears that the subject in respect of which the deduction is now claimed was a matter in difference at the time and within the scope of the reference; notwithstanding which the defendant contends that he was not obliged to

[555] Osborne v. Williams, 39 Minn. 353, 40 N. W. 165. The court, by Gilfillan, C. J., said: "The matters showing a want of consideration were pleaded for the purpose of showing that the mortgage was void, and that therefore the plaintiff was not entitled to the possession of the property, merely as a defense, and not for the purpose of recovering affirmative relief by reason of the breach of warranty. So that, conceding, what is not entirely clear, that the counterclaim might have been set up and litigated in that action, it is enough to say it was not." But compare Patrick v. Shaffer, 94 N. Y. 423; O'Connor v. Varney, 10 Gray (Mass.) 231.

[556] Smith v. Berry, 37 Me. 298.

bring forward the whole of his case before the arbitrators, but might keep back a part of it in order afterwards to use it as a set-off. But it was competent to him to have brought the whole under the consideration of the arbitrators; and therefore, without deciding against the authority of Golightly v. Jellicoe [4 Term R. 147 note] or the case cited from the civil law,[557] I think that where all matters in difference are referred, the party, as to every matter included within the subject of such reference, ought to come forward with the whole of his case." [558] But as already shown,[559] this doctrine is questioned, if not positively denied, by many respectable authorities.

§ 763. One Claim cannot be used both as Set-Off and as Cause of Action.

If the defendant in a suit has a cause of action against the plaintiff which he can use as a counterclaim, and he does set it up by way of counterclaim, he must then exhibit his whole damage, for he cannot afterwards maintain a separate action on the matter so used as a set-off or any part of it.[560] Thus, to an action on a promissory note given in payment for goods sold, the defendant pleaded want of consideration by reason of false representations of the payee concerning the value of the goods, and the plaintiff recovered judgment for a part only of the note. It was held that the defendant was barred of an action to recover further damages for such false representations.[561] So also "the defendant having elected to avail himself of his claim against the plaintiff for damages by means of a separate action, and having brought his action and prosecuted it till a verdict was rendered, could not also avail himself of the same claim in miti-

[557] A response of Scaevola, reported in Dig. 4, 8, 43.

[558] Smith v. Johnson, 15 East, 213.

[559] Supra, §§ 526, 688.

[560] Clement v. Field, 147 U. S. 467, 13 Sup. Ct. 358, 37 L. Ed. 244; Insley v. Hampton, 11 Hun, 156; Simes v. Zane, 24 Pa. 242; Boland v. Spitz, 153 Pa. 590, 26 Atl. 22; Lewis v. Smith (Tex. Civ. App.) 43 S. W. 294; Nave v. Wilson, 33 Ind. 294; Thompson v. Schuster, 4 Dak. 163, 28 N. W. 858; Phelps v. Fitzpatrick, 84 Wis. 240, 54 N. W. 614. Compare Wright v. Anderson, 117 Ind. 349, 20 N. E. 247.

[561] Burnett v. Smith, 4 Gray (Mass.) 50. See, also, Sargent v. Fitzpatrick, Id. 511.

gation of damages in this suit." [562] A judgment for the defendant in an action for work done under a contract, upon the ground of imperfect performance of the work, is a bar to a subsequent action by him to recover damages for such non-performance. "He cannot use the same defense first as a shield and then as a sword." [563] And by an even stronger reason, when a verdict is found against the defendant on a plea of set-off, he is estopped from suing the plaintiff for the demand specified in the plea of set-off.[564]

§ 764. Counterclaim not Adjudicated.

If the defendant in his answer sets up and claims a set-off, but the record shows that, on the trial of the action, the court excluded all evidence of the demand sought to be set off and gave judgment for the plaintiff, that judgment cannot be pleaded or claimed as an estoppel in an action afterwards brought by the defendant to enforce the same claim.[565] Hence the rejection of a demand offered as a set-off in a former action, is no bar to a subsequent suit for its recovery, if such demand could not legally have been allowed as a set-off, the defect arising not from failure of proof but from the nature of the claim.[566] And so a debt which, when not due, the debtor has unsuccessfully endeavored to use as a set-off, may, when it becomes

[562] Stevens v. Miller, 13 Gray (Mass.) 283.

[563] O'Connor v. Varney, 10 Gray (Mass.) 231.

[564] Eastmure v. Laws, 5 Bing. (N. C.) 444; Tillison v. Tillison, 63 Vt. 411, 22 Atl. 531; Glaude v. Peat, 43 La. Ann. 161, 8 South. 884; Dougherty v. Cummings, 9 Ohio Cir. Ct. R. 718; Latta v. Visel, 37 Neb. 612, 56 N. W. 311; Reed v. Cross, 116 Cal. 473, 48 Pac. 491.

[565] Hobbs v. Duff, 23 Cal. 596; Garrott v. Johnson, 11 Gill & J. (Md.) 173, 35 Am. Dec. 272; Niday v. Harvey, 9 Grat. (Va.) 454. But if, on the trial of an action, the defendant offered evidence in support of an account filed by him in set-off, and the question of its allowance or disallowance was submitted to and passed upon by the jury, he is precluded from again offering proof in support of the same account in another suit, although the jury may have decided in the former suit not to allow it. Baker v. Stinchfield, 57 Me. 363.

[566] Beebe v. Bull, 12 Wend. (N. Y.) 504, 27 Am. Dec. 150; De Graaf v. Wycoff, 118 N. Y. 1, 22 N. E. 1118; Haas v. Taylor, 80 Ala. 479, 2 South. 633. Where defendant pleads a counterclaim, but fails to appear on the trial, and judgment is rendered for the full amount of plaintiff's claim, such judgment cannot be set up as a bar to another action on the counterclaim. Anderson v. Rogge (Tex. Civ. App.) 28 S. W. 106; Litch v. Clinch, 35 Ill. App. 654.

due, be recovered by the creditor.[567] In an action before a justice of the peace, the defendant set up a counterclaim for unliquidated damages greatly exceeding in amount the justice's jurisdiction. But he attempted to divide his claim, putting in so much as would fall within the jurisdiction, and expressly reserving the balance for a future action. It was held that the justice had no jurisdiction to pass upon the merits of defendant's claim, in whole or in part, and that the course pursued by defendant would not preclude him from presenting his demand for such damages in a subsequent suit between the same parties.[568]

§ 765. Voluntary Allowance of Credit or Counterclaim.

Where the plaintiff recovers judgment by default against the defendant upon an account annexed to his writ, in which account defendant is credited for certain goods, the judgment is no bar to an action · · defendant against plaintiff for the same goods, if they were not credited at their full value in the first suit.[569] So where a plaintiff gives a credit in his statement, and the defendant thereupon confesses judgment, and subsequently sues the plaintiff for a cause identical in name with the credit allowed in the first suit, he is not barred by the former judgment, although the burden is on him to show that the credit in the first suit did not cover all his claim.[570] But a judgment by default, upon an account in which the defendant is credited with the full value of certain items, will bar an action by him for the same items.[571] Hence if, in an action at law, a credit is offered to be allowed to the defendant, and judgment is rendered on the verdict for the balance of plaintiff's demand, the defendant

567 Crabtree v. Welles, 19 Ill. 55.

568 Lancaster Mfg. Co. v. Colgate, 12 Ohio St. 344.

569 Minor v. Walter, 17 Mass. 237; McEwen v. Bigelow, 40 Mich. 215. A judgment recovered on an account, in which the judgment debtor is credited with a certain amount as being due from him to a third person, is a bar to a subsequent action by the judgment creditor against the debtor to recover that amount, on the claim that it has not in fact been paid by the debtor. Hermann v. Schwartz Bros. Commission Co., 59 Mo. App. 649.

570 Kauff v. Messner, 4 Brewst. (Pa.) 98.

571 Briggs v. Richmond, 10 Pick. (Mass.) 391, 20 Am. Dec. 526; Minor v. Walter, 17 Mass. 237; Hudelmeyer v. Hughes, 13 Mo. 87.

will be barred of another action to recover the amount of that item for which credit was given.[572]

§ 766. Equitable Defenses not Concluded by Judgment at Law.

If a defendant has a legal defense to an action at law, he must present it in that action, or he will be concluded, and equity will not relieve him unless he was prevented from making the defense by the fraud of the other party, or by accident, and without fault in himself. But where the defense is equitable, and beyond the cognizance of a court of law, the defendant will not be concluded by his failure to plead it there, but may assert the same by bill in equity after judgment.[573] But in those states where, under the code practice, the defendant is authorized, though not explicitly required, to offer as many defenses as he may have, equitable as well as legal, to any civil action, it may be made a question whether he will be precluded by the judgment in respect to an equitable defense which he might have set up but omitted to present. In several of these states, the party is conclusively presumed to have made use of all his equitable defenses in the one action, and is not suffered to urge them in a subsequent action or to make them the basis of a claim for equitable relief against the judgment.[574] In other words, the statute affording him an opportunity to avail himself of his equitable defense, it becomes his duty to avail himself of it, on pain of being afterwards estopped from relying upon it. In California, on the other hand, it is held that the defendant need not bring forward a defense of this character, if he prefers to reserve it for future use. "He may let the judgment go at law, and file his bill in equity for relief. Our practice, while it enlarges the field of remedy, does not take away pre-

[572] Abbott v. Stevens, 117 Mass. 340.

[573] Hawkins v. Wills, 1 C. C. A. 339, 4 U. S. App. 274, 49 Fed. 506; Tompkins v. Drennen, 6 C. C. A. 83, 56 Fed. 694; Waters v. Perkins, 65 Ga. 32; Mosby v. Wall, 23 Miss. 81, 55 Am. Dec. 71; Nims v. Vaughn, 40 Mich. 356; Bush v. Merriman, 87 Mich. 260, 49 N. W. 567; Petrie v. Badenoch, 102 Mich. 45, 60 N. W. 449, 47 Am. St. Rep. 503; Cassill v. Morrow, 13 S. D. 109, 82 N. W. 418.

[574] Tuttle v. Harrill, 85 N. C. 456; Winfield v. Bacon, 24 Barb. (N. Y.) 154; Foot v. Sprague, 12 How. Prac. (N. Y.) 355; Fowler v. Atkinson, 6 Minn. 503 (Gil. 350).

existing remedies by implication." [575] And in the same state it is held that where, in an action, an equitable defense is dismissed without being presented to the court, the judgment therein is no bar to a subsequent action, begun in due time, embracing the subject-matter of such defense.[576]

§ 767. Cross Actions.

The rule constantly insisted on in the foregoing sections, that every matter of defense is concluded by the judgment which might and should have been presented in the action, sometimes comes into apparent conflict with the equally important rule that a matter of set-off or recoupment, not inconsistent with the plaintiff's claim, need not be so presented, but may be reserved as the basis of a future action. The doubt arises in cases where it is uncertain whether the same transaction gives to each party an independent cause of action, or in cases where the defendant's contention is both a defense to the plaintiff's claim and a ground for the recovery of damages. But it is believed that all such ambiguous cases may be solved by the application of the following rule: Where judgment goes against the defendant, and he afterwards sues the plaintiff on a cross-claim which he might have presented in the first suit but did not, if the facts which he must establish to authorize his recovery are inconsistent with the facts on which the plaintiff recovered in the first action, or in direct opposition to them, the former judgment is a bar. In other words, if the way to his own recovery lies through a negation of the facts alleged by the plaintiff, that negation must be made good when the facts are first set up. For afterwards he cannot deny what the judgment affirms to be true. But if, out of the same transaction or state of facts, each party may acquire a right of action,—so that the facts on which the plaintiff recovered may very well be true, and yet the facts on which the defendant seeks to recover may be equally true,—then the former judgment is not a bar to the maintenance of the present suit.[577] For example, a judgment in favor of a carrier, in an

[575] Lorraine v. Long, 6 Cal. 452; Hough v. Waters, 30 Cal. 309; Hills v. Sherwood, 48 Cal. 386.

[576] McCreary v. Casey, 45 Cal. 128.

[577] See Thayer v. Kansas Loan & Trust Co., 41 C. C. A. 106, 100 Fed. 901;

action by him to recover freight, is a bar to an action by the owner of the goods shipped to recover damages for destruction of the property, caused by a failure on the part of the carrier to perform his contract of transportation. Where goods are so destroyed, the shipper is excused from freight, and a recovery of damages therefor would be inconsistent with the carrier's right to recover freight.[578] On the other hand, where the defendant contracted to dig a cellar and lay a wall for the plaintiff by a certain time at a certain price, but did not complete it at the given time, whereby the plaintiff suffered damage; and after the job was finished the defendant sued the plaintiff for the balance of the contract-price, and recovered judgment by default; and afterwards plaintiff brought his action for damages for breach of contract, it was held that the former recovery was no bar.[579] In another case, a purchaser of goods, having paid for them partly in cash and partly by his note, discovered that he had paid for more than he had received, but nevertheless suffered the vendor to recover judgment against him on the note, without objecting any want of consideration. He then brought an action to recover back the amount overpaid, and the action was sustained; for giving the note being a payment, a cause of action accrued to him immediately, which was independent of the judgment upon the note.[580]

§ 768. Action for Price of Goods and Cross-Action for Breach of Warranty.

In an important English case,[581] the rule was laid down that in all actions for goods sold and delivered with a warranty, or for work and labor, as well as in actions for goods agreed to be supplied according to a contract, it is competent for the defendant to show how much less the subject-matter of the action was worth by reason of the breach of the contract or warranty; and to the extent that he obtains, or is capable of obtaining, an abatement of the price on

Riley v. Hale, 158 Mass. 240, 33 N. E. 491; Schwan v. Kelly, 173 Pa. 65, 33 Atl. 1107; Lyman v. Milwaukee Harvester Co., 68 Mo. App. 637.

[578] Dunham v. Bower, 77 N. Y. 76, 33 Am. Rep. 570.

[579] Davenport v. Hubbard, 46 Vt. 200, 14 Am. Rep. 620. See, also, Foster v. Milliner, 50 Barb. (N. Y.) 385.

[580] Whitcomb v. Williams, 4 Pick. (Mass.) 228.

[581] Mondel v. Steel, 8 Mees. & W. 858.

that account, he must be considered as having received satisfaction for the breach, and he is precluded from recovering in another action to that extent, but no more. A later decision in the Queen's Bench repeats this doctrine, while carrying it so much further as to hold that the vendee need not recoup his damages in the first action, but may reserve his whole claim to be made the basis of a separate action; or, as intimated in Mondel v. Steel, he has his option to divide his cause of action, using as much of it as practicable in reduction of the vendor's recovery, and afterwards suing for the residue.[582] To a certain extent the American decisions follow the English rule thus established, but not to its extreme position. In one of the recent cases, where the vendee of a machine brought his

[582] Davis v. Hedges, L. R. 6 Q. B. 687. In this case it was said by Hannen, J.: "It is clear that before any action is brought for the price of an article sold with a warranty, or of work to be performed according to a contract, the person to whom the article is sold, or for whom the work is done, may pay the full price without prejudice to his right to sue for the breach of warranty or contract, and to recover as damages the difference between the real value of the chattels or work, and what it would have been if the warranty or contract had not been broken. Is there any reason why he should be deprived of this right by the mere fact of his opponent having commenced an action for the price? We think that there is none, and that there are some strong reasons why he should not. It appears from the passages above cited from the judgment in Mondel v. Steel, that the present practice of allowing the defense of the inferiority of the thing done to that contracted for to be applied in reduction of damages was introduced (on the same principle that the statutes of set-off were passed) for the benefit of defendants. It would greatly diminish the benefit, and in some cases altogether neutralize it, if the defendant were not allowed an option in the matter. The hypothesis is that the plaintiff for the price is in default. The conditions on which he can bring his action are usually simple and immediate. The warranted chattel has been delivered, or the work contracted for has been done; and the right to bring an action for the price, unless there is some stipulation to the contrary, arises. On the other hand, the extent to which a breach of warranty or breach of contract may afford a defense is usually uncertain; it may take some time to ascertain to what amount the value of the article or work is diminished by the plaintiff's default. It is unreasonable, therefore, that he should be able to fix the time at which the money value of his default shall be ascertained. In many cases the extent to which the value of works may be diminished by defect in their execution may be altogether incapable of discovery until some time after the day of payment has arrived. Surely the right to redress for the diminution of value, when discovered, ought not to depend on the accident whether the contracting party in the wrong had or had not issued a writ for the price."

action against the vendor for damages for breach of a warranty made upon the sale, and the defendant pleaded a judgment recovered by him against the plaintiff upon some of the notes given for the purchase price, it was held that such judgment was no bar to the present action. The court said: "The facts constituting the cause of action in this case were not involved in the former action upon the notes, and could only have been properly presented for adjudication therein by affirmative allegations and proof on the part of the defendant in such action, in the nature of counterclaim or recoupment. Formerly, in such an action, the practice allowed a full recovery of the purchase price and left the vendee to seek his remedy by a cross-action.[583] Now the vendee has his election to plead the breach of contract of warranty in reduction of damages, in an action brought by the vendor for the price, or to bring a cross-action, as was done in this case. Such action is not barred by the former recovery of the price." [584] In some of the states the courts hold that a judgment by default for the price of an article sold is no bar to an action for damages for breach of the warranty.[585] But the view advanced by the English cases above cited—that the vendee may use part of his claim in reduction of the vendor's recovery and sue for the balance in a separate action—has not found favor in any of our courts. For the most part he is given his election as to which course he will pursue, but he cannot split up one entire demand. Hence he may sue for the breach of warranty, notwithstanding a former recovery of the price, only in cases where he did not interpose the breach of warranty as a counterclaim or ground of recoupment in the first suit.[586] And if he elects to recoup his damages, for the breach of warranty, when sued for the

[583] Citing Mondel v. Steel, 8 Mees. & W. 858, and Rigg v. Bauhridge, 15 Mees. & W. 598.

[584] Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156, citing Davis v. Hedges, L. R. 6 Q. B. 687; Himes v. Kiehl, 154 Pa. 190, 25 Atl. 632; Gilmore v. Williams, 162 Mass. 351, 38 N. E. 976; Bodurtha v. Phelon, 13 Gray (Mass.) 413; McKnight v. Devlin, 52 N. Y. 399, 11 Am. Rep. 715; Barker v. Cleveland, 19 Mich. 230; Benj. Sales (3d Ed.) 894–899.

[585] Parker v. Roberts, 63 N. H. 431; Bascom v. Manning, 52 N. H. 132; Bodurtha v. Phelon, 13 Gray (Mass.) 413.

[586] Barth v. Burt, 43 Barb. (N. Y.) 628; Cook v. Moseley, 13 Wend. (N. Y.) 277; Earl v. Bull, 15 Cal. 421.

price, a decision against him in that form will be a bar to another action brought upon the warranty.[587] But even the privilege of reserving his claim for damages, to be made the foundation of a separate action, is not universally conceded to the vendee. In at least two states, as appears from the reported cases, when the vendee sues for breach of warranty of the goods sold, or for failure of manufactured articles to correspond with the contract, the seller may fully rely upon a judgment previously recovered by him for the price, as a complete bar to the action.[588] Whatever may be the rule, a parallel doctrine should be applied in cases where the two suits occur in the inverse order to that hitherto supposed. That is, when the purchaser of goods begins the litigation by suing for damages caused by the failure of the articles to correspond with the contract stipulations or the warranty, the vendor should have the same option granted to the vendee, viz., the right either to claim the purchase-price by way of set-off or recoupment, or to reserve it as the basis of a subsequent action. And so the authorities hold.[589]

§ 769. Action for Services and Cross-Action for Negligence.

A question closely analogous to that discussed in the preceding section is presented in cases where an action for damages for the negligent performance of given services is met by a plea of a former recovery of the value of such services. In New York it is held that such a plea is a complete bar. Thus, where a physician sued a party for services rendered by him in treating a broken limb, and the defendant appeared and pleaded a general denial, it was held that the fact of performance of plaintiff's contract was impliedly averred and denied by the pleadings, and that a judgment in favor of the plaintiff, for the services as claimed, necessarily included the fact of due performance by the plaintiff, and that the question of malpractice was involved in the issue and concluded by the judgment, so that the patient could not thereafter sue upon that cause

[587] Timmons v. Dunn, 4 Ohio St. 680.

[588] Davis v. Tallcot, 12 N. Y. 184; American Grocery Co. v. Pirkl, 25 Misc. Rep. 727, 55 N. Y. Supp. 606; Gilson v. Bingham, 43 Vt. 410, 5 Am. Rep. 289.

[589] Barker v. Cleveland, 19 Mich. 230.

of action.[590] And a similar rule has been applied in Massachusetts (though the services were of an entirely different nature), where defense was taken to the first action on the ground of negligence, but without seeking to recoup the damages.[591] But these cases have been vigorously criticised and resolutely denied, in decisions rendered in other states, which seem to us to be much better supported by legal reason and the best considerations of convenience and justice. This may be illustrated by the judgment in the case of Ressequie v. Byers,[592] where, after an action was commenced against a physician for malpractice in attendance upon a certain case, he instituted a suit before a justice of the peace for the value of his services for such attendance, in which suit the defendant interposed a general denial as to the value of the services, but afterwards failed to appear at the trial, and judgment was given for the physician for the amount he claimed. It was held that such judgment was no defense to the action for malpractice, and a supplemental answer setting it up as a plea in bar thereto was demurrable.[593] In order, however, to complete the discussion of this topic,

[590] Bellinger v. Craigue, 31 Barb. (N. Y.) 534; Edwards v. Stewart, 15 Barb. (N. Y.) 67; Gates v. Preston, 41 N. Y. 113; Blair v. Bartlett, 75 N. Y. 150, 31 Am. Rep. 455. See, also, White v. Merritt, 7 N. Y. 352, 57 Am. Dec. 527.

[591] Merriam v. Woodcock, 104 Mass. 326.

[592] 52 Wis. 650, 9 N. W. 779, 38 Am. Rep. 775.

[593] The court said: "The plaintiff's claim for damages resulting from malpractice constitutes a separate and independent cause of action, which he can enforce without disturbing any matter litigated in that case. He was not compelled to make the defense before the justice that the defendant's services were of no value, in order to save his rights. He had his election either to recoup his damages pro tanto in the justice's court or go for his entire claim in this. It seems to us that this is the better and more convenient rule to lay down upon the subject. If the plaintiff were compelled to make his defense in the justice's court, that the professional services were of no value, and that he had been injured by the defendant's negligence, then it would follow that he must either split up his demand so that there might be two suits instead of one upon it, or content himself with merely defeating the claim for services, or limit his damages to $200, the extent of the jurisdiction of the justice. We are not inclined to adopt a rule that would lead to any such inconvenient consequences." See, also, Sykes v. Bonner, 1 Cin. R. (Ohio) 464; Mimnaugh v. Partlin, 67 Mich. 391, 34 N. W. 717; Lawson v. Conaway, 37 W. Va. 159, 16 S. E. 564, 18 L. R. A. 627, 38 Am. St. Rep. 17; Jordahl v. Berry, 72 Minn. 119, 75 N. W. 10, 45 L. R. A. 541, 71 Am. St. Rep. 469.

it is necessary to add that if, in an action for the services, the employer does allege negligence or want of skill and seeks to recoup his damages arising therefrom, a judgment rendered against him for the full amount of the plaintiff's claim, will bar any subsequent action which he may bring for the recovery of such damages.[594] Thus, to a suit against two surgeons for malpractice, a separate answer by one that he had sued the plaintiff before a justice, to recover for his services in the same matter, and that there was an answer that the services were worthless, and a trial and judgment for the amount of the claim sued for, which remains in force, is a good plea.[595] And of course the defense of malpractice is barred by a judgment on the merits rendered for the surgeon in a suit against him by the patient for the same alleged malpractice.[596]

PART VI. WHO MAY TAKE ADVANTAGE OF THE BAR.

§ 770. Joint Contractors.

In one of the early decisions of the United States Supreme Court the position was taken by Chief Justice Marshall that a recovery in an action against one of the obligors on a joint bond, without satisfaction, was no bar to a subsequent action against a co-obligor.[597] But this ruling has been much criticised, and although the case may never have been explicitly overruled, yet the doctrine which it announced has been completely abandoned by that court, and the later utterances of the same tribunal have sanctioned an exactly opposite view.[598] The opinion that such a judgment does not merge the cause of action against the other obligor appears to be still ad-

[594] South & N. A. R. Co. v. Henlein, 56 Ala. 368; Howell v. Goodrich, 69 Ill. 556; McNicholas v. Lake, 13 Colo. App. 164, 56 Pac. 987.

[595] Goble v. Dillon, 86 Ind. 327, 44 Am. Rep. 308.

[596] Haynes v. Ordway, 58 N. H. 167.

[597] Sheehy v. Mandeville, 6 Cranch, 253, 3 L. Ed. 215.

[598] Mason v. Eldred, 6 Wall. 231, 18 L. Ed. 783; Sessions v. Johnson, 95 U. S. 347, 24 L. Ed. 596; United States v. Ames, 99 U. S. 35, 25 L. Ed. 295. In Ferrall v. Bradford, 2 Fla. 508, 50 Am. Dec. 293, the opinion is expressed that the decision in Sheehy v. Mandeville, 6 Cranch, 253, 3 L. Ed. 215, was calculated to do perfect justice between the parties concerned in it, but was entirely erroneous in principle and has been repeatedly disapproved.

hered to in one of our states.[599] But this stands as an exception to the universal consensus of opinion in England and America, and the rule is now established, by nothing less than a multitude of authorities, that where the contract or obligation sued on is joint, a recovery against one of the joint contractors merges the entire cause of action and bars any subsequent suit on the same obligation against the other debtors or any of them.[600] "It is perfectly well settled," says the supreme court of Wisconsin, "that if the holder of a joint debt or obligation sues one of the joint debtors and obtains judgment therein against him, and then sues another of the joint debtors for the same debt or obligation, the latter may plead such judgment against his co-debtor and bar the action. This is so because the joint debt is merged in the judgment against the debtor first sued, and being indivisible it cannot be merged or cancelled as to one and existing and operative as to another joint debtor." [601] According to another learned court, "a separate judgment taken

[599] Collins v. Lemasters, 1 Bailey (S. C.) 348, 21 Am. Dec. 469; Treasurers of State v. Bates, 2 Bailey (S. C.) 362; Union Bank of Georgia v. Hodges, 11 Rich. Law (S. C.) 480.

[600] King v. Hoare, 13 Mees. & W. 494; Ex parte Higgins, 3 De Gex & J. 33; Kendall v. Hamilton, L. R. 4 App. Cas. 504; Hoare v. Niblett [1891] 1 Q. B. 781; McLeod v. Power, 67 Law J. Ch. 551; Mason v. Eldred, 6 Wall. 231, 18 L. Ed. 783; Sessions v. Johnson, 95 U. S. 347, 24 L. Ed. 596; United States v. Ames, 99 U. S. 35, 25 L. Ed. 295; Willings v. Consequa, Pet. C. C. 301, Fed. Cas. No. 17,767; Trafton v. United States, 3 Story, 646, Fed. Cas. No. 14,135; Ward v. Johnson, 13 Mass. 148; Gibbs v. Bryant, 1 Pick. (Mass.) 118; Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Penny v. Martin, 4 Johns. Ch. (N. Y.) 567; Olmstead v. Webster, 8 N. Y. 413; Suydam v. Barber, 18 N. Y. 468, 75 Am. Dec. 254; Smith v. Black, 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686; Moale v. Hollins, 11 Gill & J. (Md.) 11, 33 Am. Dec. 684; Brown's Adm'r v. Johnson, 13 Grat. (Va.) 644; Ferrall v. Bradford, 2 Fla. 508, 50 Am. Dec. 293; Elliot v. Porter, 5 Dana (Ky.) 299, 30 Am. Dec. 689; Pfau v. Lorain, 1 Cin. R. 73; Clinton Bank v. Hart, 5 Ohio St. 33; Taylor v. Claypool, 5 Blackf. (Ind.) 557; Barnett v. Juday, 38 Ind. 86; Root v. Dill, Id. 169; Crosby v. Jeroloman, 37 Ind. 264; Robinson v. Snyder, 74 Ind. 110; Wilson v. Buell, 117 Ind. 315, 20 N. E. 231; Wann v. McNulty, 2 Gilman (Ill.) 355, 43 Am. Dec. 58; Moore v. Rogers, 19 Ill. 348; Mitchell v. Brewster, 28 Ill. 163; People v. Harrison, 82 Ill. 84; Bonesteel v. Todd, 9 Mich. 371, 80 Am. Dec. 90; Davison v. Harmon, 65 Minn. 402, 67 N. W. 1015.

[601] Lauer v. Bandow, 48 Wis. 638, 4 N. W. 774; Bowen v. Hastings, 47 Wis. 232, 2 N. W. 301.

against one of several joint makers of a note, in a suit to which the others are not parties, or in which steps are not taken to preserve the right to a subsequent judgment against such others, may be pleaded as a bar to a subsequent suit against those not included in the first suit or judgment." [602] In the leading English case on this subject it was well said by Baron Parke: "The distinction between the case of a joint and several contract is very clear. It is argued that each party to a joint contract is severally liable; and so he is in one sense, that if sued severally, and he does not plead in abatement, he is liable to pay the entire debt; but he is not severally liable in the same sense as he is on a joint and several bond, which instrument, though on one piece of paper or parchment, in effect comprises the joint bond of all and the several bonds of each of the obligors, and gives different remedies to the obligee." [603]

And if it is true that a judgment in an action upon a joint contract brought against one of the debtors will bar a subsequent suit against any other of them on the same obligation, it is no less true that such judgment may be pleaded in bar to an action afterwards brought against all the contractors together.[604] But where two joint makers of a note are sued, and one claims to be released because a former judgment rendered on such note is still subsisting against his co-maker, the burden is upon him to establish the fact.[605] It may be here mentioned that indorsers before delivery to the payee are jointly liable, not severally, as there is no express agreement for a several liability, and hence a judgment against one bars suits against the others.[606] So strictly is the main rule applied that it has recently been held in England that a judgment against two persons who had borrowed money from the plaintiff (though the judgment remains unsatisfied) is a bar to another action by the same plaintiff against a third person who is afterwards discovered to have

[602] Kennard v. Carter, 64 Ind. 31.

[603] King v. Hoare, 13 Mees. & W. 494.

[604] Reynolds v. Pittsburgh, C. & St. L. R. Co., 29 Ohio St. 602; Ex parte Higgins, 3 De Gex & J. 33.

[605] Robinson v. Snyder, 97 Ind. 56.

[606] Brady v. Reynolds, 13 Cal. 31.

been really interested, as a partner, with the two debtors in the business for the purposes of which the money was borrowed.[607]

In a few cases, however, the strict application of this rule has been relaxed, in view of circumstances which would render its operation too harsh and inequitable. Thus it has been held that where one of two joint debtors is dead, a judgment recovered against the survivor (which remains unsatisfied) is not a bar to proceedings on the original claim against the estate of the other.[608] This decision may perhaps be sustained on the theory that the death of the one debtor in some way severed their joint relationship, or because the plaintiff could not choose whether to sue them jointly or severally, and therefore should not be taken as having released the estate of the one not joined. In another case, A., B., and C. were joint obligors in a bond to D. On a breach of the condition, D. sued the obligors, and by the fraudulent statements of A. and B. he was led to discontinue the suit as to them and take judgment against C. alone D. then sued A. and B. on the bond (the judgment against C. remaining unsatisfied), and they pleaded the former judgment in bar, to which D. replied their fraud, and they demurred to the replication. It was held that the judgment was no bar.[609] But we are unable to discover any ground, good in law, on which this ruling can be sustained. We must also be careful to distinguish actions on the original debt from actions on subsidiary or collateral obligations. Thus, where one of three joint covenantors gave a bill of exchange for part of the debt secured by the covenant, on which bill judgment was recovered, it was held to be no bar to an action of covenant against the three, such bill, though stated to have been given for the payment and in satisfaction of the debt, not being averred to have been accepted as satisfaction or to have produced it in fact.[610] And it is also necessary, before applying the rule in question, to be sure that the parties supposed to be jointly liable really occupy that relation. For example, the insurers of a vessel

[607] Kendall v. Hamilton, 4 App. Cas. 504.

[608] Devol v. Halstead, 16 Ind. 287. See, also, Weyer v. Thornburgh, 15 Ind. 124.

[609] Ferrall v. Bradford, 2 Fla. 508, 50 Am. Dec. 293.

[610] Drake v. Mitchell, 3 East, 251.

and the owners of another vessel, which injures the first in a collision, are not jointly liable in any such sense that a decree in admiralty, awarding damages against the vessel in fault, which does not produce complete satisfaction, can be pleaded in bar to an action against the insurers for the balance of the loss. There is no such privity between the indemnitor and a third person who may be liable for the same damages, as that between joint trespassers or joint contractors.[611]

It must be added that in several of the states the common law rule concerning the effect of a judgment against one or more of several joint obligors has been reversed by statutory provisions. These statutes provide that a judgment rendered against one or more persons jointly liable on any contract or agreement, less than the whole number of persons so bound, shall not work an extinguishment or merger of the cause of action as to the persons not bound by such judgment.[612] Again, in applying these rules, we are to distinguish between a judgment on the joint contract itself and a judgment on any undertaking or agreement collateral to it or in the nature of a guaranty. Thus, a judgment on a note given by one of the makers of a joint note as collateral to the joint note does not affect the right of action on the original note so long as the judgment remains unsatisfied.[613] And further, the rule applies only where the plaintiff has recovered a judgment as at common law. For example, where one of two obligors makes an assignment for the benefit of creditors, and the obligee files his claim on the bond with the assignee, and obtains an adjudication thereof in his favor in the court having control of the assigned estate, this is not such a judgment as will merge the cause of action on the bond so as to release the other obligor.[614] Finally, it has been held that, where

[611] Dunham v. New England Mut. Ins. Co., 1 Low. 253, Fed. Cas. No. 4,152.

[612] See Code Md. art. 50, § 10; Thomas v. Mohler, 25 Md. 36; Westheimer v. Craig, 76 Md. 399, 25 Atl. 419; Code D. C. 1901, § 1207; Harris v. Leonhardt, 2 App. D. C. 318; Code Va. 1887, §§ 3212, 3395, 3396; Cahoon v. McCullock, 92 Va. 177, 23 S. E. 225; Rev. St. Tex. 1895, art. 1203; Bute v. Brainerd, 93 Tex. 137, 53 S. W. 1017.

[613] First Nat. Bank of Milwaukee v. Finck, 100 Wis. 446, 76 N. W. 603. And see Wegg-Prosser v. Evans, 9 Reports, 830; Id. [1895] 1 Q. B. 108.

[614] Schott v. Youree, 142 Ill. 233, 31 N. E. 591.

an action is brought against both of the persons who are jointly liable on a bond or contract, and judgment is entered against both of them by default, but the default is afterwards vacated as to one of the defendants, with leave given to him to plead, he cannot contend that the judgment against his co-defendant will operate as an extinguishment of the cause of action, or as a bar to a judgment against himself; for, in these circumstances, there is no election on the part of the plaintiff to pursue his remedy against the one defendant only.[615]

§ 771. One Joint Contractor a Non-Resident.

Courts have not hesitated to set aside the rule just considered in cases of absolute necessity. And such a case arises when one of the joint debtors is a non-resident. Here it is plainly impossible for the plaintiff to secure a valid judgment against them both in one action. And therefore his election to sue the one who is within the jurisdiction is not an implied release of the other. Accordingly it is well settled that an unsatisfied judgment against one of two joint debtors does not bar a subsequent action upon the original claim against the other, where the latter, at the time the first suit was brought, was without the jurisdiction of the state and consequently beyond the reach of legal service; in such case it stands in the same situation as where judgment has been rendered in a suit against one party to a joint and several contract.[616] On the same principle, where a suit was brought in New York against two joint debtors, one of whom was not served with process and did not appear in the suit, and judgment was rendered in form against both,

[615] Heckemann v. Young, 134 N. Y. 170, 31 N. E. 513, 30 Am. St. Rep. 655; O'Hanlon v. Scott, 89 Hun, 44, 35 N. Y. Supp. 31.

[616] Beck & Pauli Lith. Co. v. Wacker & Birk B. & M. Co., 22 C. C. A. 11, 76 Fed. 10; Dennett v. Chick, 2 Me. 191, 11 Am. Dec. 59; Rand v. Nutter, 56 Me. 339; West v. Furbish, 67 Me. 17; Olcott v. Little, 9 N. H. 259, 32 Am. Dec. 357; Burt v. Stevens, 22 N. H. 232; Tibbetts v. Shapleigh, 60 N. H. 487; Tappan v. Bruen, 5 Mass. 193; Odom v. Denny, 16 Gray (Mass.) 114; Brown v. Birdsall, 29 Barb. (N. Y.) 549; Campbell v. Steele, 11 Pa. 394; Yoho v. McGovern, 42 Ohio St. 11; Whittaker v. Stone, 16 Ohio Cir. Ct. R. 635; Merriman v. Barker, 121 Ind. 74, 22 N. E. 992; Hitchcock v. Frackelton, 116 Mich. 487, 74 N. W. 720.

it was held that an action brought subsequently in Michigan, against the two, was properly brought upon the original demand instead of upon the judgment.[617]

§ 772. Effect of Joint Debtor Acts.

In several of the states statutes have been enacted—commonly called "joint debtor acts"—which provide that where an action is brought upon a joint contract or obligation, and some of the persons named as defendants are not served with process, judgment may be entered against all the defendants, if the joint liability is found as alleged, to be enforced against joint property of all and the individual property of those served. And further clauses in these statutes have been construed as declaring that the individual liability of one not served continues to exist notwithstanding the rendition of such a joint judgment. Hence these acts materially modify the common law rule. In point of fact, they make all contracts several in their legal effect, although joint in form. And consequently, after such a judgment is recovered, a defendant who was not served in the first action may be sued upon the original claim and held to a personal liability.[618] In some other states, although a separate action against a defendant in that position is not allowed, yet the statutes authorize a proceeding by which, after due notice and an opportunity to be heard, a defendant who was not served in the original action may be connected with the judgment therein, so as to be personally liable for its satisfaction. The effect of these statutes is explained by the supreme court of Wisconsin in a recent case, from which we quote as follows: "At the common law, if the plaintiff in an action on a joint obligation failed to obtain service of process on one of the joint debtors, and proceeded to judgment against those served, his remedy was gone against the debtor not served, because the obligation was

[617] Bonesteel v. Todd, 9 Mich. 371, 80 Am. Dec. 90.

[618] Oakley v. Aspinwall, 4 N. Y. 515; Rufty v. Claywell, 93 N. C. 306; Ells v. Bone, 71 Ga. 466; Wooters v. Smith, 56 Tex. 198; Smith v. Coopers, 9 Iowa, 376. And see Kramer v. Schatzkin, 27 Misc. Rep. 206, 57 N. Y. Supp. 803; Capital City Dairy Co. v. Plummer, 20 Ind. App. 408, 49 N. E. 963; Finch v. Galigher, 181 Ill. 625, 54 N. E. 611; Ingwaldson v. Olson, 79 Minn. 252, 82 N. W. 579.

indivisible and had become merged in the judgment, and there was nothing left upon which he could predicate another action. The statute was enacted to give the plaintiff a remedy in such a case against the joint debtor not served. It does not give an action on the original joint obligation, because that is merged in the judgment against the joint debtor or debtors served with process; but it gives a proceeding in the nature of scire facias against the joint debtor not served, which may result in holding him bound by the judgment in the same manner as if he had been originally summoned. But if the obligation is several, as well as joint, it is divisible, and the judgment upon it against one debtor does not merge the several obligation of another debtor not summoned. That remains, and the plaintiff may bring another action upon it against the latter; but in such a case the statute does not give the plaintiff the remedy therein prescribed, in addition to his common law right of action on the original debt. In short, the joint debtors of the statute are those who are jointly and not severally liable for the same debt." [619]

§ 773. Successful Defense by one Joint Debtor.

A successful defense made by one of the joint debtors in an action against him, if it was not on a ground purely personal to himself, will bar a future action by the same plaintiff on the same obligation against another of the debtors. "If a verdict and judgment for the plaintiff against one of several who are jointly bound may be admitted in evidence in an action against another as a bar, it would seem to be a necessary corollary (if the deduction be not a fortiori) that a verdict and judgment against the plaintiff in the former action, upon an issue going to the merits and ascertaining that the plaintiff never had any cause of action against that defendant, would be admissible as a bar to a subsequent action against another so jointly bound." [620] At common law, a verdict and judgment against

[619] Dill v. White, 52 Wis. 456, 9 N. W. 404. See, also, Yoho v. McGovern, 42 Ohio St. 11; Erwin v. Scotten, 40 Ind. 389.

[620] Brown's Adm'r v. Johnson, 13 Grat. (Va.) 644; Phillips v. Ward, 2 Hurl. & C. 717; Nevill v. Hancock, 15 Ark. 511; Hill v. Morse, 61 Me. 541; Hunt v. Terrill's Heirs, 7 J. J. Marsh. (Ky.) 67; Mann v. Edwards, 34 Ill. App. 473. But a judgment in favor of one or more joint contractors is no

the plaintiff, in his action against all the debtors jointly, since it might be based merely on the ground of his having failed to establish a joint liability, would not be necessarily conclusive in an action afterwards brought by him against one of the former defendants, alleging a several liability. But where the statute provides that, in an action on a joint contract, judgment may be rendered against one or more of the defendants individually, if it should turn out upon the trial that only one or more of them is liable upon the contract, a judgment on the merits in favor of all the defendants in such action is a bar to a subsequent action, by the same plaintiff on the same alleged promise, against one of the defendants in the former suit. For the several liability of that defendant was no less involved in the determination of the first action than was his joint liability, it being as much the right of the plaintiff in that case to litigate and enforce the one as the other. And "if he availed himself of his right to a several judgment against the defendant in that [former] action, the question at issue in this [latter] case has been adjudicated; if he did not, it was his own fault, for he had the opportunity to do so; and the result in either case is the same."[621]

§ 774. Joint and Several Contractors.

If the contract or obligation put in suit is joint and several, it is not merged in a judgment recovered against one of the contractors, and such a judgment, so long as it remains unsatisfied, will not bar an action against another of the contractors.[622] As was remarked

bar to an action against another of the joint contractors, who was not served with process in the first action, being beyond the jurisdiction of the court, and did not voluntarily appear. Larison v. Hager (C. C.) 44 Fed. 49.

[621] Roby v. Rainsberger, 27 Ohio St. 674.

[622] King v. Hoare, 13 Mees. & W. 494; United States v. Price, 9 How. 83, 13 L. Ed. 56; Townsend v. Riddle, 2 N. H. 448; Sawyer v. White, 19 Vt. 49; Hawkes v. Phillips, 7 Gray (Mass.) 284; Benson v. Paine, 2 Hilt. (N. Y.) 552; Russell v. McCall, 141 N. Y. 437, 36 N. E. 498, 38 Am. St. Rep. 807; City of Philadelphia v. Stewart, 23 Pa. Co. Ct. R. 552; Sully v. Campbell, 99 Tenn. 434, 42 S. W. 15, 43 L. R. A. 161; Day v. Hill, 2 Speers (S. C.) 628, 42 Am. Dec. 390; Hix v. Davis, 68 N. C. 233; Clinton Bank v. Hart, 5 Ohio St. 33; Kirkpatrick v. Stingley, 2 Ind. 269; Moore v. Rogers, 19 Ill. 348; Harlan v. Berry, 4 G. Greene (Iowa) 212; Armstrong v. Prewitt, 5 Mo. 476, 32 Am.

in the case first cited, a joint and several bond, "though on one piece of paper or parchment, in effect comprises the joint bond of all and the several bonds of each of the obligors, and gives different remedies to the obligee." And this rule has been extended by analogy to cases where two or more parties are jointly and individually liable, though not upon bond or contract. Thus, where a plaintiff recovered judgment against a sheriff's deputy, for default in his official duty, and took his body in execution, it was held that he was not thereby barred of his remedy against the sheriff for the same default. Said the court: "Although the causes of action are not precisely identical, yet the sheriff is subjected equally with his deputy to a responsibility for his official neglect or misconduct. The relation between them, in point of effect, produces the same consequences as that between joint and several promisors or joint trespassers; the judgment recovered against one does not extinguish the right of action against the rest, but this consequence merely results from satisfaction made to the creditor."[623] But the parties to a bill of exchange or promissory note, that is, the maker and indorser, or drawer, acceptor, and indorser, as the case may be, cannot be regarded as joint parties, unless there is an express stipulation to that effect. And consequently a recovery by the holder against one of them, without satisfaction, is no bar to his action against another on the same instrument.[624] Thus, in an early case, it was adjudged that if the indorsee of a bill of exchange, on default of payment by the acceptor, recovers against the drawer, but does not take out execution, this recovery cannot be pleaded in bar to a second action on the same bill by the same indorsee against the last indorser.[625] But it must be remarked that full payment and satisfaction of a judgment for the whole debt against one of several

Dec. 338; McLaurine v. Monroe's Adm'rs, 30 Mo. 462; McReady v. Rogers 1 Neb. 124, 93 Am. Dec. 333; Handley v. Jackson (Or.) 51 Pac. 1098.

[623] Morgan v. Chester, 4 Conn. 387.

[624] Brooklyn City & N. R. Co. v. National Bank of the Republic of New York, 102 U. S. 14, 26 L. Ed. 61; Allen v. Union Bank of Louisiana, 5 Whart. (Pa.) 420; Russell & Erwin Manuf'g Co. v. Carpenter, 5 Hun (N. Y.) 162, Gilman v. Foote, 22 Iowa, 560; Hitchcock v. Frackelton, 116 Mich. 487, 74 N. W. 720; Beals v. Clinton Circuit Judge, 91 Mich. 146, 51 N. W. 885.

[625] Claxton v. Swift, 2 Show. 441.

persons jointly and severally liable for such debt operates as a discharge of all.[626]

§ 775. Joint Judgment on Joint and Several Contract.

While it is true that where the contract or obligation is joint and several, the promisee or obligee may elect to sue the debtors jointly or severally, yet "even in that case, the rule is subject to the limitation that, if the plaintiff obtains a joint judgment, he cannot afterwards sue them separately; for the reason that the contract or bond is merged in the judgment; nor can he maintain a joint action after he has recovered a judgment against one of the parties in a separate action, as the prior judgment is a waiver of his right to pursue a joint remedy." [627] In other words, "it is essential to the idea of election that a man cannot have both. One judgment against all or each of the obligors is a satisfaction and extinguishment of the bond. It no longer exists as a security, being superseded, merged, and extinguished in the judgment, which is a security of a higher nature." [628] According to the doctrine obtaining in Pennsylvania, the plaintiff is understood to have chosen his remedy as soon as he brings a joint action against all the debtors. And the result is that if he does not in that suit recover against the whole number of them, he cannot afterwards maintain separate actions against those not included in the first judgment.[629] But in Ohio, the election of the creditor, whether to treat the obligation as joint or several, is not conclusively determined by the commencement of a joint action, but becomes fixed only upon the recovery of judgment against all the joint makers of the instrument. And therefore the institution of a joint action against all the makers of such an instrument, in which process is only served upon a part, and judgment against but one, is no bar to a separate action against one not served with process.[630] The rule that the recovery of a joint judg-

[626] Jameson v. Barber, 56 Wis. 630, 14 N. W. 859.

[627] Sessions v. Johnson, 95 U. S. 347, 24 L. Ed. 596.

[628] United States v. Price, 9 How. 83, 13 L. Ed. 56. To the same effect, see Ex parte Rowlandson, 3 P. Wms. 405; Clinton Bank v. Hart, 5 Ohio St. 33; Williams v. McFall, 2 Serg. & R. (Pa.) 280.

[629] Beltzhoover v. Commonwealth, 1 Watts, 126.

[630] Clinton Bank v. Hart, 5 Ohio St. 33.

ment upon a joint and several obligation merges the debt and prevents any subsequent separate action, has been directly denied in Illinois. In that state it has been said: "Where the contract is joint and several, its legal effect is double, equivalent to independent contracts founded upon one consideration, for performance severally and also for performance jointly; and distinct remedies upon the same instrument, treating it as a joint contract and as a several contract, may be pursued until satisfaction is fully obtained." [631] But this doctrine is opposed both by the weight of judicial reason and by the decided preponderance of authority. But it does not necessarily follow that a judgment in such a joint action against the plaintiff will be conclusive in a subsequent separate action. Thus, in a case in Indiana, "the former suit was upon a joint and several obligation of K., B., and P., against all three. The judgment upon the issue made determined that K. and P. were not jointly liable with B., but did not determine that K. was not severally liable upon the note described in the declaration, which is the question now at issue. The point is quite different. He might be liable alone and yet not jointly. The judgment is not, in a legal sense, between the same parties nor upon the same contract." [632]

§ 776. Judgments against Partners.

On the principle that a judgment against one of two joint obligors or contractors bars an action against the other, a former recovery against one partner for a firm debt is a bar to a recovery against the other members of the firm in another suit for the same debt.[633] And

[631] People v. Harrison, 82 Ill. 84, citing Wann v. McNulty, 2 Gilman, 355, 43 Am. Dec. 58; Thompson v. Emmert, 15 Ill. 415; Moore v. Rogers, 19 Ill. 347; Mitchell v. Brewster, 28 Ill. 163. See, also, Charles v. Haskins, 11 Iowa, 329, 77 Am. Dec. 148. The case of United States v. Cushman, 2 Sumn. 426, Fed. Cas. No. 14,908, which favored this view, was overruled in United States v. Price, 9 How. 83, 13 L. Ed. 56.

[632] Kirkpatrick v. Stingley, 2 Ind. 269.

[633] Wann v. McNulty, 2 Gilman (Ill.) 355, 43 Am. Dec. 58; Smith v. Black, 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686; Moale v. Hollins, 11 Gill & J. (Md.) 11, 33 Am. Dec. 684; Sloo v. Lea, 18 Ohio, 279; Cahdee v. Clark, 2 Mich. 255; Nichols v. Burton, 5 Bush (Ky.) 320; Ex parte Higgins, 3 De Gex & J. 33; National Broadway Bank v. Hitch, 66 Hun, 401, 21 N. Y. Supp. 395; Keith Bros. & Co. v. Stiles, 92 Wis. 15, 64 N. W. 860.

this is so even where the plaintiff was at first ignorant that the persons whom he afterwards pursues were members of the firm. Thus, where a party brought his suit against S. and S. as partners under the firm name of S., S., & Co., and makers of a promissory note, and recovered a judgment, which remained unsatisfied, and afterwards discovered that P. and V. were also partners in the firm at the time the note was given, and brought an action against the four as makers of the same note, it was held that the judgment previously recovered was a bar.[634] Where a party sues three partners on a note, obtains judgment against two of them, continuing the case as to the third, and afterwards, amending the complaint, abandons the note and sues upon the original indebtedness represented thereby, such third partner may set up in bar of the action against him the judgment recovered against the other two.[635] But in some of the states, under statutes which make all liabilities of partners joint and several, a judgment against one partner, not satisfied, is not a bar to an action against the other.[636]

§ 777. Joint Tort-Feasors.

The general rule followed in America is that the liability of two or more persons who jointly engage in the commission of a tort is joint and several, and gives the same rights of action to the person injured as a joint and several contract. Consequently a judgment recovered against one of two joint tort-feasors, remaining unsatisfied, is no bar to an action against the other for the same tort.[637]

[634] Robertson v. Smith, 18 Johns. (N. Y.) 459, 9 Am. Dec. 227; Smith v. Black, 9 Serg. & R. (Pa.) 142, 11 Am. Dec. 686; Scott v. Colmesnil, 7 J. J. Marsh. (Ky.) 416. Per contra, Watson v. Owens, 1 Rich. Law (S. C.) 111.

[635] Exchange Bank v. Ford, 7 Colo. 314, 3 Pac. 449.

[636] Hyman v. Stadler, 63 Miss. 362.

[637] Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129; Sessions v. Johnson, 95 U. S. 347, 24 L. Ed. 596; American Bell Telephone Co. v. Albright (C. C.) 32 Fed. 287; Cleveland v. City of Bangor, 87 Me. 259, 32 Atl. 892, 47 Am. St. Rep. 326; Preston v. Hutchinson, 29 Vt. 144; Sheldon v. Kibbe, 3 Conn. 214, 8 Am. Dec. 176; Stone v. Dickinson, 5 Allen (Mass.) 29, 81 Am. Dec. 727; Elliott v. Hayden, 104 Mass. 180; Livingston v. Bishop, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330; Atlantic Dock Co. v. Mayor, etc., of City of New York, 53 N. Y. 64; Elliot v. Porter, 5 Dana (Ky.) 299, 30 Am. Dec. 689; United Society of Shakers v. Underwood, 11 Bush (Ky.) 265, 21 Am. Rep. 214; Knott v. Cunningham, 2 Sneed (Tenn.) 204; City of Roodhouse v. Christian, 158 Ill. 137, 41 N. E. 748; Turner v. Hitchcock, 20 Iowa, 310; Williams v. Sutton, 43 Cal. 65.

§ 778. Joint Trespassers; English Rule.

In England the rule has now become firmly established that persons jointly engaged in the commission of a trespass are not jointly and severally liable in any such sense that successive actions may be prosecuted against each of them; but a judgment against one of the joint trespassers, even though unsatisfied, may be pleaded in bar of another action against a co-trespasser.[638] This doctrine appears to have been first advanced in the case of Brown v. Wootton.[639] This was an action of trover for certain plate. The defendant pleaded that the plaintiff had already brought his action for the same property against one J. S., supposing the conversion to have been by him, and had recovered judgment for his damages, and averred that it was for the same goods and for the same trover and conversion. It was argued that the plea was ill, for no satisfaction of that judgment was alleged. "But all the court," says the report, "held the plea to be good; for the cause of action being against divers, for which damages uncertain are recoverable, and the plaintiff having judgment against one person for damages certain, that which was uncertain before is reduced in rem judicatam and to certainty, which takes away the action against the others; and therefore Popham said, if one hath judgment to recover in trespass against one, and damages are certain, although he be not satisfied, yet he shall not have a new action for this trespass." But this decision was not immediately accepted as good law. In fact, for a considerable period, judicial opinion on the point underwent much fluctuation.[640] But in the latest case on

[638] King v. Hoare, 13 Mees. & W. 494, 504; Brown v. Wootton, Cro. Jac. 73; Lendall's Case, 1 Leon. 19; Day v. Porter, 2 Moody & R. 151; Buckland v. Johnson, 15 C. B. 145; Brinsmead v. Harrison, L. R. 7 C. P. 547.

[639] Cro. Jac. 73. This case is also reported in Yel. 67, under the name of Broome v. Wooton.

[640] In the important case of Livingston v. Bishop, 1 Johns. 290, 3 Am. Dec. 330, Chief Justice Kent explained the relation of the earlier and later English authorities to the decision in Brown v. Wootton, in the following manner: "This case of Brown v. Wootton was clearly introductory of a new rule. It is laid down in Brooke, Judgm. pl. 98, 'that if two commit a trespass, I can have several actions against them, and recover the entire damages against each, and have execution; and one defendant cannot plead that the plaintiff hath recovered against the other for the same trespass and taken him in

the subject, the court, while professing to entertain "the highest respect for the American jurists" (who, in the meantime, had strongly contended for the opposite view), has concluded to follow the earlier rulings; and it is now settled law, in that country, that one joint trespasser can plead in bar a judgment recovered against his co-trespasser, for the same cause of action, even though no satisfaction of such judgment be alleged or shown.[641]

§ 779. Joint Trespassers; American Rule.

A very few of the American decisions adhere to the rule just stated to be established in England.[642] But it is settled by the vast preponderance of authority in this country, that where several persons engage in the commission of a trespass, their liability is not merely

execution. And in Morton's Case, Cro. Eliz. 80, it was even made a question by one of the judges whether a judgment and execution, with satisfaction, against one joint trespasser, could be pleaded by another trespasser, but the court held it reasonable that it should be a bar. And many cases subsequent to that of Brown v. Wootton seem to disregard it, and to make the satisfaction against one trespasser the test of the plea. Thus in Cocke v. Jenner, Hob. 66, the court held that if trespassers be sued in several actions, the plaintiff may make choice of the best damages, but that when he has taken one satisfaction, he can take no more, and if he attempt it, an audita querela will lie. Again, in the case of Corbet v. Barnes, Wm. Jones, 377, the court said that for one assault the plaintiff can have several actions and recover, but when recovery is had against one, and satisfaction, the plaintiff cannot have a second satisfaction, any more than where separate suits are brought upon a joint and several obligation. So late as the case of Bird v. Randall, 3 Burr. 1345, Lord Mansfield advanced the same doctrine, and observed that, in case of a joint trespass, the defendants were all liable to the plaintiff and he might proceed against any or all of them as he pleased, yet he shall have but one satisfaction from them all. I am therefore inclined to question the extent of the decision in Brown v. Wootton, and to hold that a recovery against one joint trespasser is not alone a bar to a suit against another. There must at least be an execution thereon, to bring a case within the facts on which that decision was founded, and that, perhaps, may be deemed an election by the plaintiff de melioribus damnis, and sufficient to conclude him."

[641] Brinsmead v. Harrison, L. R. 6 C. P. 584. This case was also heard in the Exchequer Chamber, on error to the Common Pleas, and was affirmed. See s. c. L. R. 7 C. P. 547.

[642] Hunt v. Bates, 7 R. I. 217, 82 Am. Dec. 592; Wilkes v. Jackson, 2 Hen. & M. 355; Petticolas v. City of Richmond, 95 Va. 456, 28 S. E. 506, 64 Am. St. Rep. 811.

joint, but joint and several, and the plaintiff may maintain his action against one or more or all of them; and consequently a judgment recovered against one of the joint trespassers, but not satisfied, is no bar to other actions for the same trespass against the others.[643] "That each joint trespasser is answerable for the act of all," says the court in Ohio, "and that the plaintiff may pursue his remedy against one or all, is unquestioned. He is entitled to a compensation in damages for the injury he sustained by the commission of the trespass. This compensation he may recover from one or all of the joint trespassers. His remedy against them severally is concurrent, and they are quasi collateral security for each other, until the plaintiff has obtained satisfaction. It would seem to follow from this doctrine that a recovery of a judgment against one joint trespasser would be no bar to a suit and recovery against another. If a judgment against one of several joint trespassers is of itself a bar to all legal proceedings against the others, it will, in a great degree, deprive the plaintiff of his right of bringing several suits, and of his election de melioribus damnis, as each defendant, except in the suit first tried,

[643] Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129; Collard v. Delaware, L. & W. R. Co. (C. C.) 6 Fed. 246; Smith v. Rines, 2 Sumn. 338, Fed. Cas. No. 13,100; Jones v. Lowell, 35 Me. 541; Sanderson v. Caldwell, 2 Aiken, 195; Chamberlin v. Murphy, 41 Vt. 110; Sprague v. Waite, 19 Pick. (Mass.) 455; Stone v. Dickinson, 5 Allen (Mass.) 29, 81 Am. Dec. 727; Elliott v. Hayden, 104 Mass. 180; Savage v. Stevens, 128 Mass. 254; Sheldon v. Kibbe, 3 Conn. 214, 8 Am. Dec. 176; Ayer v. Ashmead, 31 Conn. 453, 83 Am. Dec. 154; Vincent v. McNamara, 70 Conn. 332, 39 Atl. 444; Fowler v. Owen, 68 N. H. 270, 39 Atl. 329, 73 Am. St. Rep. 588; Union Associated Press v. Heath, 49 App. Div. 247, 63 N. Y. Supp. 96; Livingston v. Bishop, 1 Johns. (N. Y.) 290, 3 Am. Dec. 330; Guille v. Swan, 19 Johns. (N. Y.) 381, 10 Am. Dec. 234; Marsh v. Berry, 7 Cow. (N. Y.) 344; Floyd v. Browne, 1 Rawle (Pa.) 125, 18 Am. Dec. 602; Allen v. Craig, 13 N. J. Law, 294; Bloss v. Plymale, 3 W. Va. 393, 100 Am. Dec. 752; Griffie v. McClung, 5 W. Va. 131; Whitaker's Adm'r v. English, 1 Bay (S. C.) 14; Hawkins v. Hatton, 1 Nott & McC. (S. C.) 318, 9 Am. Dec. 700; Brooks v. Ashburn, 9 Ga. 297; Blann v. Cocheron, 20 Ala. 320; Du Bose v. Marx, 52 Ala. 506; Wallace v. Miller, 15 La. Ann. 449; McGehee v. Shafer, 15 Tex. 198; United Society of Shakers v. Underwood, 11 Bush (Ky.) 265, 21 Am. Rep. 214; Elliot v. Porter, 5 Dana (Ky.) 299, 30 Am. Dec. 689; Knott v. Cunningham, 2 Sneed (Tenn.) 204; Wright v. Lathrop, 2 Ohio, 33, 15 Am. Dec. 529; Jack v. Hudnall, 25 Ohio St. 255, 18 Am. Rep. 298; Brady v. Ball, 14 Ind. 317; Fleming v. McDonald, 50 Ind. 278, 19 Am. Rep. 711; Page v. Freeman, 19 Mo. 421; Turner v. Hitchcock, 20 Iowa, 310.

may plead puis darrein continuance the recovery in that suit as a bar to the plaintiff's further proceeding, thereby limiting the plaintiff to the recovery of a single verdict, and subjecting him to the payment of costs in all the suits but the one first tried." [644] On this principle, a judgment against an agent for a fraud committed while acting within the scope of his agency, while it remains unsatisfied, is no bar to an action against his principal for the same fraud.[645]

§ 780. Election between Joint and Several Action.

The plaintiff who is injured by a tortious act shared in by several must elect whether he will prosecute them all in a joint action, or sue one or more separately. He cannot do both. "Courts everywhere in this country agree that the injured party in such a case may proceed against all the wrong-doers jointly, or he may sue them all or any one of them separately; but if he sues them all jointly and has judgment, he cannot afterwards sue any one of them separately; or if he sues any one of them separately and has judgment, he cannot afterwards seek his remedy in a joint action, because the prior judgment against one is, in contemplation of law, an election on his part to pursue his several remedy." [646]

§ 781. Successful Defense by one Joint Trespasser.

In actions of tort, where the wrong is joint and several, and the plea of one of the defendants is such as shows that the plaintiff could have no cause of action against any of them, if the plea is found against the plaintiff, it operates to the benefit of all the defendants.[647] But of course it would be otherwise where one defendant, sued separately, obtained a verdict on a defense purely personal to himself.

[644] Wright v. Lathrop, 2 Ohio, 33, 15 Am. Dec. 529.

[645] Maple v. Cincinnati, H. & D. Co., 40 Ohio St. 313. 48 Am. Rep. 685.

[646] Sessions v. Johnson, 95 U. S. 347, 24 L. Ed. 596; Smith v. Rines, 2 Sumn. 348, Fed. Cas. No. 13,100; Hutchinson v. Brown, 19 D. C. 136; O'Hanlon v. Scott, 89 Hun, 44, 35 N. Y. Supp. 31; McCredy v. Thrush, 37 App. Div. 465, 56 N. Y. Supp. 68. Compare Davis v. Caswell, 50 Me. 294.

[647] Williams v. McGrade, 13 Minn. 46 (Gil. 39); Sonnentheil v. Moody (Tex. Civ. App.) 56 S. W. 1001.

§ 782. Satisfaction of Judgment against One.

The plaintiff can have but one satisfaction for a joint wrong. And therefore if he recovers a judgment against one of the joint tortfeasors and obtains satisfaction, this operates as a discharge of the others.[648] And if judgment is obtained in one action and satisfied, while the others are pending, such judgment and satisfaction may be pleaded in bar of any further prosecution of such other actions, and in that case the plaintiff will not be entitled to judgments for nominal damages and costs, but judgment must be given for the defendants.[649] If the plaintiff has actually recovered separate judgments for the same tort, it is the prevalent opinion that they cannot all be enforced, but he will be required to elect which one he will enforce (in other words, make his election de melioribus damnis) and the satisfaction of one will satisfy the other.[650] Hence the rule, accepted by many of the authorities, that the suing out of execution on a judgment recovered against one of the wrong-doers, whether it

[648] Sessions v. Johnson, 95 U. S. 347, 24 L. Ed. 596; Stone v. Dickinson, 5 Allen (Mass.) 29, 81 Am. Dec. 727; Savage v. Stevens, 128 Mass. 254; Luce v. Dexter, 135 Mass. 23; Mathews v. Lawrence, 1 Denio (N. Y.) 212, 43 Am. Dec. 665; Union Associated Press v. Press Pub. Co., 24 Misc. Rep. 610, 54 N. Y. Supp. 183; Pasthoff v. Banendahl, 6 N. Y. St. Rep. 613; Smith v. Singleton, 2 McMul. (S. C.) 184, 39 Am. Dec. 122; Karr v. Barstow, 24 Ill. 580; Stanley v. Leahy, 87 Ill. App. 465; Miller v. Beck, 108 Iowa, 575, 79 N. W. 344; Garner v. Henzig, 15 Mo. App. 591; Bryant v. Reed, 34 Neb. 720, 52 N. W. 694; Grimes v. Williams' Estate, 113 Mich. 450, 71 N. W. 835. Plaintiff, having been arrested in judicial proceedings which were entirely void, brought an action for false imprisonment against the complaining witness, the magistrate, and the constable who arrested him, and recovered a judgment, which was satisfied. It was held that he could not afterwards bring an action for such imprisonment against the sheriff into whose custody he was delivered by the constable; and this, although it was stated in the first action that the imprisonment continued till the time of plaintiff's delivery to the sheriff, while in the second action it was alleged to have commenced at that time; for the plaintiff was entitled to recover all his damages in the first action, and satisfaction of the judgment rendered therein operated as a release of all the joint wrongdoers. Blackman v. Simpson, 120 Mich. 377, 79 N. W. 573.

[649] Savage v. Stevens, 128 Mass. 254; Mitchell v. Libbey, 33 Me. 74.

[650] Putney v. O'Brien, 53 Iowa, 117, 4 N. W. 891.

results in satisfaction or not, will release the others.[651] But it must be added that numerous other decisions are opposed to this view, holding that nothing short of actual satisfaction received will produce this result.[652] And in one case it is held that a plea setting forth a former recovery against a co-trespasser and a voluntary payment of the damages and costs to the clerk in open court by the defendant in that judgment, without averring that the plaintiff accepted such payment in satisfaction of his recovery, is bad on demurrer.[653] A recovery in replevin with a return of the goods bars an action of trespass against the same and other parties for damages, whether the damages awarded in the replevin suit have been paid or not, because the return is a satisfaction for the trespass.[654] But it appears that where separate actions are prosecuted to judgment against joint tort-feasors, partial execution of the judgment against one is not such satisfaction as will release the other.[655] And if, while separate suits are pending against several joint trespassers, one suit is settled and the defendant therein discharged, although it was the intention of both parties that the discharge should affect only the cause of action against the defendant, and that it should not affect the plaintiff's right of recovery in the other suits, it will yet operate as a discharge of the entire cause of action against all, and there can be no recovery in the other suits, either of nominal damages or of costs.[656]

[651] White v. Philbrick, 5 Me. 147, 17 Am. Dec. 214; Boardman v. Acer, 13 Mich. 77, 87 Am. Dec. 736; Kenyon v. Woodruff, 33 Mich. 310; Fleming v. McDonald, 50 Ind. 278, 19 Am. Rep. 711; Allen v. Wheatley, 3 Blackf. (Ind.) 332; Smith v. Singleton, 2 McMul. (S. C.) 184, 39 Am. Dec. 122.

[652] Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129; Sheldon v. Kibbe, 3 Conn. 214, 8 Am. Dec. 176; Norfolk Lumber Co. v. Simmons, 2 Marv. (Del.) 317, 43 Atl. 163; Page v. Freeman, 19 Mo. 421; Knott v. Cunningham, 2 Sneed (Tenn.) 204.

[653] Blann v. Cocheron, 20 Ala. 320.

[654] Karr v. Barstow, 24 Ill. 580.

[655] McVey v. Manatt, 80 Iowa, 132, 45 N. W. 548.

[656] Ayer v. Ashmead, 31 Conn. 447, 83 Am. Dec. 154. And see Spurr v. North Hudson County R. Co., 56 N. J. Law, 346, 28 Atl. 582.

PART VII. PLEADING AN ESTOPPEL OF RECORD.

§ 783. Necessity of Pleading Prior Adjudication.

Upon the question, whether a party who intends to rely upon a former adjudication as conclusive of the matters presently in issue must plead it as an estoppel, on pain of being deprived of its benefit as a claim or defense if he omits to do so, or whether he may simply introduce the record in evidence, with the same final effect as if it had been pleaded,—the authorities are by no means in harmony. In England, one of the most important cases contains a dictum to the effect that a former judgment between the same parties is "as a plea, a bar, and as evidence, conclusive." [657] But notwithstanding this, another leading case decides that a prior adjudication is not conclusive by way of estoppel unless pleaded; that if it is merely given in evidence under the general issue, it amounts to no more than a matter of argument or inference, and the jury are at liberty to find according to the truth of the matter; and this rule is undoubtedly sustained by the preponderance of authority in that country,[658] and in Canada.[659] In the United States there has been great contrariety of opinion. Numerous cases, in accordance with the English rule, hold that the benefit of an estoppel by record is waived unless it is seasonably interposed by plea.[660] In one state it is said that if the cir-

[657] Duchess of Kingston's Case, 20 How. St. Tr. 478.

[658] Vooght v. Winch, 2 Barn. & Ald. 662; Hannaford v. Hunn, 2 Car. & P. 148; Dimes v. Company of Proprietors of Grand Junction Canal Co., 9 Q. B. 469; Magrath v. Hardy, 4 Bing. N. C. 782; Outram v. Morewood, 3 East, 346; Doe v. Huddart, 2 Comp. M. & R. 316.

[659] Hughes v. Rees, 9 Ont. 198.

[660] Fowler v. Halt, 10 Johns. (N. Y.) 111; Derby v. Yale, 13 Hun (N. Y.) 273; Wright v. Butler, 6 Wend. (N. Y.) 284, 21 Am. Dec. 323; Bryson v. St. Helen, 79 Hun, 167, 29 N. Y. Supp. 524; Reich v. Cochran, 74 Hun, 551, 26 N. Y. Supp. 443; Smith v. Elliott, 9 Pa. 345; Water Commissioners of City of New Brunswick v. Cramer, 61 N. J. Law, 270, 39 Atl. 671, 68 Am. St. Rep. 705; Gray v. Pingry, 17 Vt. 419, 44 Am. Dec. 345; Beall v. Walker, 26 W. Va. 741; Brown v. Tillman, 121 Ala. 626, 25 South. 836; Adams v. Yazoo & M. V. R. Co., 77 Miss. 194, 24 South. 200; Norton v. Norton (Ky.) 25 S. W. 750; Royalty v. Shirley (Ky.) 53 S. W. 1044; Meiss v. Gill, 44 Ohio St. 253, 6 N. E. 656; Wann v. McNulty, 2 Gilman (Ill.) 355, 43 Am. Dec. 58; Reilly v. Bader, 50 Minn. 199, 52 N. W. 522; Gregory v. Kenyon, 34 Neb. 640, 52 N.

cumstances and course of proceedings admit, a defendant who relies upon a former judgment must plead it, so as to give the plaintiff an opportunity to set up any objection he may have to its validity.[661] In another, "it is the settled rule of pleading that where a party makes a judgment of a court the foundation of his action or defense, he must make the record of such judgment, or a transcript of it, a part of the pleading setting it up, as in case of written instruments. Former recovery cannot be given in evidence under the general denial." [662] In Arkansas, "where it is necessary to plead a former judgment in bar of an action, it cannot be given in evidence unless pleaded, because of the general rule that the proof must correspond with the allegations." [663] So in equity, a former decree, to be a defense, must be pleaded or relied on in the answer as a bar, and it is not enough to read it at the hearing.[664] But these views, as we shall presently show, are not supported by the majority of the decisions of the American courts. On the contrary, the general tendency is to attach the same final and conclusive effect to a prior adjudication wherever and whenever it is set up, whether that be done by plea or in the course of the evidence.

§ 784. Where there is no Opportunity to Plead.

A former recovery in which the same matter was tried and determined upon the merits, may be given in evidence without being specially pleaded, wherever the party, plaintiff or defendant, had no opportunity to plead the judgment specially, and its effect, in such case, is equally conclusive as if it had been pleaded.[665] "Conceding

W. 685; Kilpatrick v. Kansas City & B. R. Co., 38 Neb. 620, 57 N. W. 664, 41 Am. St. Rep. 741; Josephi v. Mady Clothing Co., 13 Mont. 195, 33 Pac. 1; State v. Board of Com'rs of Washoe Co., 12 Nev. 17; Boston & C. Smelting Co. v. Reed, 23 Colo. 523, 48 Pac. 515; Brown v. Campbell, 110 Cal. 644, 43 Pac. 12.

[661] Murray v. Murray, 6 Or. 26; Bays v. Trulson, 25 Or. 109, 35 Pac. 26.

[662] Brady v. Murphy, 19 Ind. 258. See First Nat. Bank of Huntington v. Williams, 126 Ind. 423, 26 N. E. 75.

[663] State v. Spikes, 33 Ark. 801.

[664] Lyon v. Tallmadge, 14 Johns. (N. Y.) 501; Turley v. Turley, 85 Tenn. 251, 1 S. W. 891.

[665] Regina v. Haughton, 1 El. & Bl. 501; Chase v. Walker, 26 Me. 555; Dame v. Wingate, 12 N. H. 291; Gray v. Pingry, 17 Vt. 419, 44 Am. Dec. 345;

the general rule to be as claimed by appellant, that estoppel by former judgment must be specially pleaded, it does not apply where no opportunity to plead the estoppel is given. In such case the record may be given in evidence with the same conclusive effect as if it had been specially pleaded." [666] For example, the defendant may give the prior adjudication in evidence under the plea of "not guilty" in ejectment and trover, no other plea being allowed in those actions; and the plaintiff may give the judgment in evidence in answer to any matter of defense which was not specially pleaded, for he had no opportunity to reply the estoppel.[667] So a former judgment may be given in evidence under the general issue when such judgment was rendered subsequent to the entry of the plea of general issue.[668]

§ 785. When Admissible under General Issue.

Before the question of the conclusiveness of a former judgment which has not been pleaded can be finally determined, it is necessary to furnish an answer to another question, viz., in what cases such prior adjudication is admissible as evidence under the plea of the general issue. In some of the states there seems to be no restriction whatever in this regard. Whether conclusive or not, the judgment is always receivable as evidence. "The defense of former recovery or adjudication can be as well taken advantage of under the general issue as by a special plea in bar. This seems now to be the more liberal practice." [669] In Massachusetts, under the statutes, if the judgment be a fact relied upon in avoidance of the action, it must be set forth in the answer. Such a judgment, of a peculiar

Isaacs v. Clark, 12 Vt. 692, 36 Am. Dec. 372; Perkins v. Walker, 19 Vt. 144; Beebe v. Elliott, 4 Barb. (N. Y.) 457; Wright v. Butler, 6 Wend. (N. Y.) 284, 21 Am. Dec. 323; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Young v. Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594; Dows v. McMichael, 6 Paige (N. Y.) 139; Ward v. Ward, 22 N. J. Law, 699; Sheldon v. Patterson, 55 Ill. 507; Flandreau v. Downey, 23 Cal. 354; Jackson v. Lodge, 36 Cal. 28; McNair v. O'Fallon, 8 Mo. 188; Wilkes v. Davies, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103.

[666] Clink v. Thurston, 47 Cal. 21.

[667] Young v. Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594.

[668] Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627.

[669] George v. Gillespie, 1 G. Greene (Iowa) 421. See, also, Renkert v. Elliott, 11 Lea (Tenn.) 235, 250; Fowlkes v. State, 14 Lea (Tenn.) 14.

nature, is a discharge in bankruptcy or insolvency. But if the judgment be an adjudication between the same parties, and against the plaintiff, of issues which tend directly to disprove the allegations contained in the declaration, then it is admissible in evidence under an answer denying those allegations.[670] But the rule generally followed at common law—independent of special statutes and of the changes wrought by the introduction of the code practice in several of the states—is thus given: "The defendant may give the judgment in evidence under the general issue in those cases where other matters in discharge of the action can be proved under that issue; as in ejectment, assumpsit, and actions on the case, or where he is sued for an act done as a public officer, and is not, therefore, required to plead specially."[671] There is no doubt, for example, that in the action of assumpsit, the record of a former judgment between the parties may be given in evidence under the general issue.[672] In the language of the supreme court of the United States: "It has been long since established that under non assumpsit the defendant may give in evidence anything which shows that no debt was due at the time when the action was commenced, whether it arise from an inherent defect in the original promise or a subsequent discharge and satisfaction. And the precise point now in controversy has been adjudged to be completely within the rule. If the former judgment

[670] Foye v. Patch, 132 Mass. 105; Gen. St. Mass. c. 129.

[671] Young v. Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594.

[672] Stafford v. Clark, 2 Bing. 377; Young v. Black, 7 Cranch, 565, 3 L. Ed. 440; Bartels v. Schell (C. C.) 16 Fed. 341; Miller v. Manice, 6 Hill (N. Y.) 124; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Carvill v. Garrigues, 5 Pa. 152; Finley v. Hanbest, 30 Pa. 190; Cook v. Field, 3 Ala. 53, 36 Am. Dec. 436; Lampton v. Jones, 5 T. B. Mon. (Ky.) 235; Cook v. Vimont, 6 T. B. Mon. (Ky.) 284, 17 Am. Dec. 157; Reynolds v. Stansbury, 20 Ohio, 344, 55 Am. Dec. 459 (overruling Inman v. Jenkins, 3 Ohio, 271); Wann v. McNulty, 2 Gilman (Ill.) 355, 43 Am. Dec. 58; Young v. Rummell, 2 Hill (N. Y.) 478, 38 Am. Dec. 594. In the case last cited it was admitted that Fowler v. Hait, 10 Johns. (N. Y.) 111, was to the contrary, but the court suggested that that case was virtually overruled in Wilt v. Ogden, 13 Johns. (N. Y.) 56, and Sill v. Rood, 15 Johns. (N. Y.) 230. In Coles v. Carter, 6 Cow. (N. Y.) 691, it was held that a former recovery could not be given in evidence under the general issue; but the action was trespass, where all matters of defense which admit the original wrong must be specially pleaded. As to actions on contract, compare Blackwell v. Dibbrell (N. C.) 9 S. E. 192.

had been for the plaintiff, there would be no doubt that it would have extinguished the demand, and it is no less conclusive because it was for the defendant." [673] Similar principles are applicable to an action of case. As Lord Mansfield said: "An action upon the case is founded upon the mere justice and conscience of the plaintiff's case, and is in the nature of a bill in equity, and, in effect, is so; and therefore a former recovery, release, or satisfaction need not be pleaded but may be given in evidence. For whatever will, in equity and conscience, according to the circumstances of the case, bar the plaintiff's recovery, may, in this action, be given in evidence by the defendant; because the plaintiff must recover upon the justice and conscience of his case, and upon that only." [674] So also an estoppel may be given in evidence under the general issue in ejectment, at least in jurisdictions where special pleading is not allowed in that action, and for that reason there is no opportunity to set up the judgment by way of plea.[675] It is also held that a former recovery may be given in evidence under the plea of nil debet in an action of debt.[676] And in a trial upon a writ of audita querela, a prior judgment for the defendant, for the same cause of action, may be either pleaded in bar as an estoppel or given in evidence under the plea of "not guilty." [677] But it is otherwise in the action of trespass.[678]

§ 786. Waiver of Estoppel by Failure to Plead.

It is next to be observed that, even conceding that a former judgment is conclusive when merely given in evidence, cases will sometimes arise in which the party will lose the benefit of the estoppel unless he so frames his pleadings as to bring it within the issues.[679]

[673] Young v. Black, 7 Cranch, 565, 3 L. Ed. 440.

[674] Bird v. Randall, 3 Burrows, 1353; Gilchrist v. Bale, 8 Watts (Pa.) 355, 34 Am. Dec. 469; Jones v. Weathersbee, 4 Strob. (S. C.) 50, 51 Am. Dec. 653.

[675] Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603.

[676] Welsh v. Lindo, 1 Cranch, C. C. 508, Fed. Cas. No. 17,409.

[677] Mussey v. White, 58 Vt. 45, 3 Atl. 319.

[678] Coles v. Carter, 6 Cow. (N. Y.) 691; Jones v. Lavender, 55 Ga. 228; Briggs v. Milburn, 40 Mich. 512. Compare Stancill v. James, 126 N. C. 190, 35 S. E. 245.

[679] See Bryar v. Campbell, 177 U. S. 649, 20 Sup. Ct. 794, 44 L. Ed. 926; Mack v. Levy (C. C.) 60 Fed. 751; House v. Lockwood, 63 Hun, 630, 17 N. Y.

Thus, for example, in an action on the case for the continuance of a nuisance caused by the erection of a dam, a verdict and judgment for the plaintiff in a former action, in which the same matter was in controversy between the parties, will be conclusive evidence. But in such action, in order to avail himself of this conclusiveness, the plaintiff must take care not to waive it by his manner of pleading As, if the defendant pleads a license, and the plaintiff does not, in his replication, rely upon the estoppel of the former judgment, but replies "no license," then the jury are not precluded from inquiring into the truth of the case.[680]

§ 787. Conclusiveness of Judgment when not Pleaded.

Supposing the particular action to be such that the record of a former adjudication between the same parties will be admissible in evidence, although it has not been specially pleaded, and that the benefit of the estoppel has not been waived as indicated in the preceding section, it remains to inquire whether or not the judgment, when so offered, will be conclusive upon the issues to which it is relevant. On this question, as we have already stated, there exists the greatest contrariety of opinion. On the one hand, the majority of the English decisions, together with a large number of authorities in this country, are positive in declaring that where a party has an option whether to plead a former recovery or to give it in evidence under the general issue (as is the case in assumpsit), and chooses the latter course, it will not be conclusive, but only persuasive evidence, and the jury will be at liberty to find according to the truth of the matter.[681] But on the other hand, both the preponderance of au-

Supp. 817; Crumlish's Adm'r v. Shenandoah Val. R. Co., 45 W. Va. 567, 32 S. E. 234; Cherry v. York (Tenn. Ch. App.) 47 S. W. 184.

[680] Kilheffer v. Herr, 17 Serg. & R. (Pa.) 319, 17 Am. Dec. 658.

[681] Vooght v. Winch, 2 Barn. & Ald. 662; Redmond v. Coffin, 2 Dev. Ch. 437; Ferguson v. Miller, 5 Ohio, 460; Cooley v. Brayton, 16 Iowa, 10; Cleaton v. Chambliss, 6 Rand. (Va.) 86; Blandy v. Griffith, 3 Fish. Pat. Cas. 609, Fed. Cas. No. 1,529; Wann v. McNulty, 2 Gilman (Ill.) 355, 43 Am. Dec. 58; Jackson v. Wood, 3 Wend. (N. Y.) 27; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Gray v. Pingry, 17 Vt. 419, 44 Am. Dec. 345; Isaacs v. Clark, 12 Vt. 692, 36 Am. Dec. 372; Smith v. Elliott, 9 Pa. 345. In the case of Miller v. Manice, 6 Hill (N. Y.) 114, 124, Chancellor Walworth said: "It

thority, in this country, and the weight of sound legal reason sustain the doctrine that the former judgment, if admissible under the general issue, is just as conclusive when so presented as if it had been specially set up by a plea in bar.[682] Certain other cases, without

appears to be pretty well settled that in actions of assumpsit, where anything which shows that the plaintiff has no subsisting right of action may be given in evidence under the general issue, a former verdict and judgment may be given in evidence without being pleaded. Young v. Black, 7 Cranch, 565, 3 L. Ed. 440; Kilheffer v. Herr, 17 Serg. & R. (Pa.) 322, 17 Am. Dec. 658; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603. But it does not appear to be perfectly settled in England that the former recovery, when given in evidence under the general issue in assumpsit, where it might have been pleaded, is conclusive as a flat bar, as it would have been if pleaded in bar of the second suit. See Stafford v. Clark, 1 Car. & P. 403, 9 J. B. Moore, 724. The cases in which the courts in this state and in England have held the former verdict and judgment conclusive as a bar, when given in evidence without being pleaded, are those in which the party insisting upon the estoppel has had no opportunity to plead it, as in an action of ejectment, where special pleading is not allowed (Wood v. Jackson, 8 Wend. [N. Y.] 35, 22 Am. Dec. 603), or in cases where the plaintiff's own title is by estoppel, and the defendant, by his pleading, does not give him an opportunity to reply the estoppel. Wright v. Butler, 6 Wend. (N. Y.) 284, 21 Am. Dec. 323; Burt v. Sternburgh, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402. The general rule, however, unquestionably is, that where the party in whose favor the former verdict and judgment were rendered wishes to rely on them as a conclusive bar, or as an estoppel, he must plead such former judgment in bar, if he has an opportunity to do so. And if he neglects to set it up by pleading, and puts the same matter again in issue to be tried, the jury may decide such issue according to the right and justice of the case as it appears to them from the evidence, notwithstanding the verdict and judgment in the former suit. Trevivan v. Lawrence, 1 Salk. 276; Outram v. Morewood, 3 East, 346; Howard v. Mitchell, 14 Mass. 241; Kilheffer v. Herr, 17 Serg. & R. (Pa.) 319, 17 Am. Dec. 658."

[682] Duchess of Kingston's Case, 20 How. St. Tr. 538; Bird v. Randall, 3 Burrows, 1353; Southern Pac. R. Co. v. United States, 168 U. S. 1, 18 Sup. Ct. 18, 42 L. Ed. 355; David Bradley Mfg. Co. v. Eagle Mfg. Co., 7 C. C. A. 442, 58 Fed. 721; Adams v. Barnes, 17 Mass. 365; Betts v. Starr, 5 Conn. 550, 13 Am. Dec. 94; Bradford v. Burgess, 20 R. I. 290, 38 Atl. 975; Beebe v. Elliott, 4 Barb. (N. Y.) 457; Wright v. Butler, 6 Wend. (N. Y.) 284, 21 Am. Dec. 328; Gardner v. Buckbee, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256; Burt v. Sternburgh, 4 Cow. (N. Y.) 559, 15 Am. Dec. 402; Niles v. Totman, 3 Barb. (N. Y.) 594; White v. Coatsworth, 6 N. Y. 137; Fritz v. Tompkins, 18 Misc. Rep. 514, 41 N. Y. Supp. 985; Drake v. New York Suburban Water Co., 26 App. Div. 499, 50 N. Y. Supp. 826; Foulke v. Thalmessinger, 1 App. Div. 598, 37 N. Y. Supp. 563; Marsh v. Pier, 4 Rawle (Pa.) 288, 26 Am. Dec. 131; Westcott v. Edmunds, 68 Pa. 34; Beall v. Pearre, 12 Md. 550; Jones

going to the same lengths with the authorities last cited, have favored the rule that, aside from the question whether a former judgment is conclusive as a bar, if not pleaded, it is certainly admissible as evidence of the same facts arising in another suit. That is, when the former judgment was rendered between the same parties, but upon a different cause of action, so that it would not constitute a bar to the prosecution of the present suit, but is relied on as a conclusive determination of certain facts, issues, or controversies common to the two suits, it is not necessary to plead it specially, but it may be introduced in evidence, with conclusive effect.[688]

§ 788. Arguments on the Question.

The best legal reason, as well as the soundest considerations of public policy, apparently require that the same attribute of conclusiveness should attach to the judgment however it may be presented. The chief arguments in support of this view were clearly and forcibly stated in an early Pennsylvania decision, from which we quote as follows: "The propriety of those decisions which have admitted a judgment in a former suit to be given in evidence to a jury on the trial of a second suit for the same cause, between the same parties or those claiming under them, but at the same time have held that the jury were not absolutely bound by such judgment because it was not pleaded, may well be questioned. The maxim, 'nemo debet bis vexari si constat curiæ quod sit pro una et eadem causa,' being considered, as doubtless it was, established for the benefit and protection of the party, he may therefore waive it, and unquestionably, so far as he individually is concerned, there

v. Weathersbee, 4 Strob. (S. C.) 50, 51 Am. Dec. 653; Little v. Barlow, 37 Fla. 232, 20 South. 240, 53 Am. St. Rep. 249; Cannon v. Brame, 45 Ala. 262; Warwick v. Underwood, 3 Head (Tenn.) 238, 75 Am. Dec. 767; Gavin v. Graydon, 41 Ind. 559; Gray v. Gillilan, 15 Ill. 453, 60 Am. Dec. 761; Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 57 Ill. App. 430; Offutt v. John, 8 Mo. 120, 40 Am. Dec. 125; Strong v. Phœnix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; Garton v. Botts, 73 Mo. 274; Flandreau v. Downey, 23 Cal. 354.

[688] Krekeler v. Ritter, 62 N. Y. 372; Marston v. Swett, 66 N. Y. 206, 23 Am. Rep. 43; Foulke v. Thalmessinger, 158 N. Y. 725, 53 N. E. 1125; Lance v. Shaughnessy, 86 Hun, 411, 33 N. Y. Supp. 515; Swank v. St. Paul City Ry. Co., 61 Minn. 423, 63 N. W. 1088; Bell v. Raymond, 18 Conn. 91; Walker v. Chase, 53 Me. 258.

can be no rational objection to his doing so. But then it ought to be recollected that the community has also an equal interest and concern in the matter, on account of its peace and quiet, which ought not to be disturbed at the will and pleasure of every individual in order to gratify vindictive and litigious feelings. Hence it would seem to follow that wherever, on the trial of a cause, from the state of the pleadings in it, the record of a judgment rendered by a competent tribunal upon the merits in a former action for the same cause, between the same parties or those claiming under them, is properly given in evidence to the jury, it ought to be considered conclusively binding on both court and jury, and to preclude all further inquiry in the cause; otherwise the rule or maxim, 'expedit reipublicæ ut sit finis litium,' which is as old as the law itself, and a part of it, will be exploded and entirely disregarded. But if it be part of our law, as seems to be admitted by all that it is, it appears to me that the court and jury are clearly bound by it, and not at liberty to find against such former judgment. A contrary doctrine, as it seems to me, subjects the public peace and quiet to the will or neglect of individuals, and prefers the gratification of a litigious disposition on the part of suitors to the preservation of the public tranquillity and happiness. The result, among other things, would be that the tribunals of the state would be bound to give their time and attention to the trial of new actions, for the same causes tried once or oftener in former actions between the same parties or privies, without any other limitation than the will of the parties litigant, to the great delay and injury, if not exclusion occasionally, of other causes which never have passed in rem judicatam. The effect of the judgment of a court having jurisdiction over the subject-matter of controversy between the parties, even as an estoppel, is very different from an estoppel arising from the act of the party himself, in making a deed of indenture, etc., which may or may not be enforced at the election of the other party; because whatever the parties have done by compact they may undo by the same means. But a judgment of a proper court, being the sentence or conclusion of the law upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the

consent of the parties, and is not only binding upon them but upon the courts and juries ever afterwards, as long as it shall remain in force and unreversed." [684] For another consideration, "it has been well remarked that it appears inconsistent that the authority of a res judicata should govern the court, when the matter is referred to them by pleading, but that a jury should be at liberty altogether to disregard it, when the matter is referred to them in evidence; and that the operation of so important a principle should be left to depend upon the technical forms of pleading in particular actions. And notwithstanding there are many respectable opposing decisions, the weight of authority, at least in the United States, is believed to be in favor of the position that when a former recovery is given in evidence, it is equally conclusive in its effect as if it were specially pleaded by way of estoppel." [685]

§ 789. Under Code Practice.

In those states which have adopted the code system of pleading, the rules concerning the admissibility of a judgment not specially pleaded have been materially changed. Thus in New York, "prior to the code, a former suit and recovery for the same cause of action could be given in evidence under the plea of the general issue, in actions like ejectment and trover, in which special pleas were not allowed. But now the answer of the defendant, in every case, must contain a statement of 'any new matter constituting a defense.' Hence a former recovery, whether obtained before or after the joining of the issue, cannot be given in evidence, in any action whatever, under a general denial of the allegations in the complaint, or under an allegation, in the answer, of the pendency of the action wherein the recovery was had." [686] And the rule is the same in California.[687] In Indiana, where the statute provides that "under a

[684] Marsh v. Pier, 4 Rawle, 273, 288, 26 Am. Dec. 131.

[685] 1 Greenl. Ev. § 531. See, also, Chamberlain v. Carlisle, 26 N. H. 540.

[686] Hendricks v. Decker, 35 Barb. 298; Brazill v. Isham, 12 N. Y. 9. And see, as to Louisiana and Missouri, In re Scarborough, 44 La. Ann. 288, 10 South. 858; Preferred Acc. Ins. Co. v. Barker, 35 C. C. A. 250, 93 Fed. 158; Glenn v. Priest (C. C.) 48 Fed. 19.

[687] Piercy v. Sabin, 10 Cal. 22, 70 Am. Dec. 692; Brown v. Campbell, 110 Cal. 644, 43 Pac. 12.

mere denial of any allegation, no evidence shall be introduced which does not tend to negative what the party making the allegation is bound to prove," it is held that the record of a former recovery is not admissible as evidence, under a plea of general denial, unless proof of the former suit be necessary under the averments of the complaint.[688] In Georgia, the code directs that "matter in avoidance" shall be specially pleaded. It is held that a former recovery comes within this rule and is not admissible under the general issue.[689] In Ohio, when an answer sets up new matter, and the plaintiff relies upon the estoppel of a former judgment, involving the determination of such matter, he should plead such prior adjudication; it is not admissible in evidence under a general or special denial of the new matter contained in the answer.[690] But in California, upon this particular point, the rule is otherwise, there being there no replication to the answer.[691]

§ 790. Requisites of Plea of Former Judgment.

In regard to the degree of strictness and technicality required in pleading an estoppel by record, it is important to observe the distinction between the case where the former judgment is relied on in bar of the present action, and the case where it is put forward as a conclusive determination of some of the issues. As stated by the supreme court of the United States, "when the record of a former judgment is set up as establishing some collateral fact involved in a subsequent controversy, it must be pleaded strictly as an estoppel, and the rule is that such a pleading must be framed with great certainty, as it cannot be aided by any intendment. But when a former judgment is set up in bar of an action, or as having determined the entire merits of the controversy, it is not required to be pleaded with any greater strictness than any other plea in bar, or any plea in avoidance of the matters alleged in the antecedent pleading of the opposite party." [692]

[688] Norris v. Amos, 15 Ind. 365.
[689] Greaves v. Middlebrooks, 59 Ga. 240.
[690] Fanning v. Hibernia Ins. Co., 37 Ohio St. 344, 41 Am. Rep. 517.
[691] Wixson v. Devine, 67 Cal. 341, 7 Pac. 776.
[692] City of Aurora v. West, 7 Wall. 82, 19 L. Ed. 42. A judgment is suf-

It has been held that a plea of former recovery which contains neither a recital of the term of court at which the judgment relied on as a bar was recovered, nor the date of its rendition, is bad on demurrer.[693] But the later cases favor the view that the plea is sufficient in this respect if it distinctly shows that the judgment relied on was rendered before the institution of the suit at bar; or that, although the failure to allege a date may be ground for a motion to make more certain, it will not render the plea vulnerable to a demurrer.[694]

It is especially necessary that the plea should show the identity of the causes of action or matters in litigation in the two actions, or that the issues upon which the former judgment is alleged to be conclusive are identically the same with those set up and determined in the former suit, or were within the scope of the controversy there involved and might have been litigated and determined therein.[695] It is said that the plea is sufficient in this respect if it alleges that the former action was "for the same identical debts and causes of action as are set forth in the case at bar, the same identical debts and causes of action being pleaded in the complaint as were pleaded in the complaint in the action first brought, and none others." [696] But in an action on a contract, a plea of former recovery "for an alleged vio-

ficiently pleaded in estoppel by alleging the fact of its rendition, without alleging legal conclusions following therefrom. Bracken v. Atlantic Trust Co., 36 App. Div. 67, 55 N. Y. Supp. 506. Where a plea gives the parties to a former suit in the same court, refers to all the documents, pleadings, and judgment, and makes them a part of the plea, "as though fully and in detail set out herein," this is sufficient in a plea of res judicata, as the court takes judicial notice of its own records. Pittel v. Fidelity Mut. Life Ass'n, 30 C. C. A. 21, 86 Fed. 255.

[693] Mount v. Scholes, 120 Ill. 394, 11 N. E. 401. And see Wortham v. Com., 5 Rand. (Va.) 669.

[694] Thomas v. Thomas, 33 Neb. 373, 50 N. W. 170, 29 Am. St. Rep. 483; Ludlow v. Marion Tp. Gravel Road Co., 101 Ind. 176; Kenney v. Howard, 67 Vt. 375, 31 Atl. 850.

[695] Taylor v. Hutchinson, 61 N. J. Law, 440, 39 Atl. 664; Glaser v. Meyrovitz, 119 Ala. 152, 24 South. 514; Dunn v. Barton, 2 Ind. App. 444, 28 N. E. 717; Brooke v. Gregg, 89 Md. 234, 43 Atl. 38.

[696] Wilson v. Buell, 117 Ind. 315, 20 N. E. 231; Whitcomb v. Hardy, 68 Minn. 265, 71 N. W. 263. And see Wythe v. Salem, 4 Sawy. 88, Fed. Cas. No. 18,121; Rynearson v. Parkhurst, 88 Ind. 264. Compare Crum v. Rea, 14 Ind. App. 379, 42 N. E. 1033.

lation of the contract," there being no averment that the former recovery was for the same violation, or that the causes of action are identical, is bad.[697] In case the issues in the two suits might have been different, though they concerned the same subject-matter, the pleader must see to it that he excludes this hypothesis. For instance, in trover for the conversion of chattels, a plea of former recovery in detinue, not alleging that the question of ownership entered into the issue in the former trial and was then decided, and not negativing the idea that the recovery in that case was because of a failure to prove the defendant's possession, is fatally defective.[698]

Again, in pleading a former judgment in bar, it must be distinctly shown that such former judgment was on the merits, and definite facts should be pleaded showing the determination of the merits against the adverse party.[699] This is sufficiently shown by a plea averring that the case was tried before a court and jury, "whereupon the jury, on their oaths, rendered a verdict in favor of him the said defendant, against him the said plaintiff, and the court rendered a judgment accordingly against the plaintiff for all the costs of the suit." [700] But where a bill for relief in regard to infringement of a patent was dismissed on demurrer, and, in a subsequent suit, a plea averred that the parties, the letters patent relied on, and the acts of infringement complained of were the same as in the former suit, it was held that it did not show that the matters in suit were res judicata.[701]

Since only a final judgment can have the effect of barring a subsequent suit between the same parties, a plea setting up a former recovery as a bar must distinctly allege that the judgment so pleaded was final.[702] But it is considered that it is not necessary for the

[697] Montrose v. Wanamaker, 57 Hun, 590, 11 N. Y. Supp. 106.

[698] Gilbreath v. Jones, 66 Ala. 129. And see Crandall v. Gallup, 12 Conn. 365.

[699] Philipowski v. Spencer, 63 Tex. 604; Fowlkes v. State, 14 Lea (Tenn.) 14; Perkins v. Moore, 16 Ala. 9; Wade v. Howard, 8 Pick. (Mass.) 353; Taylor v. Barron, 35 N. H. 484; Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368, 66 N. W. 471; Riley v. Jarvis, 43 W. Va. 43, 26 S. E. 366; Dunklee v. Goodenough, 63 Vt. 459, 21 Atl. 494; s. c. 65 Vt. 257, 26 Atl. 988.

[700] Ellis v. Staples, 9 Humph. (Tenn.) 238.

[701] Whitaker v. Davis (C. C.) 91 Fed. 720.

[702] Southern Ry. Co. v. Brigman, 95 Tenn. 624, 32 S. W. 762; Thomas

pleader to allege, in addition to the statement of the rendition of the judgment and its finality, that it still remains in full force, or that it has not been reversed or vacated or otherwise annulled; for, when rendered, it is presumed to remain in force until the contrary appears, and presumptions of law need not be stated.[703]

Further, it is necessary for a plea of res judicata to aver that the parties are the same in the two suits, or to allege facts which show that the relation of the pleader to the former action was such as to make the judgment conclusive in his favor, or that the party against whom the estoppel is alleged, if not directly a party to the former suit, was so connected with it in interest as to be bound by the result.[704] Thus, in an action against an indorser of a note, an answer alleging that a judgment had previously been rendered on the note, but without stating against whom such judgment was given, is not sufficient.[705] But a plea setting up a former judgment between plaintiff and a third party as binding on defendant need not allege in terms that defendant had such control of the former action as to be bound by the judgment, but is sufficient if the facts pleaded warrant such a conclusion by the court.[706]

In pleading a former judgment as a bar, it is also necessary to allege that it was rendered by a court of competent jurisdiction. But if the court was one possessing general jurisdiction, it will not be necessary for the plea to set out all the facts and circumstances bringing the particular case within its cognizance, or to describe the issuance and service of process or appearance of the parties; it will be presumed that the court had jurisdiction of the subject-matter and the parties.[707] In the case of a court of special or inferior juris-

v. Thomas, 33 Neb. 373, 50 N. W. 170, 29 Am. St. Rep. 483. Compare Theller v. Hershey (C. C.) 89 Fed. 575.

[703] Campbell v. Cross, 39 Ind. 155; Mull v. McKnight, 67 Ind. 525; Kenney v. Howard, 67 Vt. 375, 31 Atl. 850.

[704] Spargur v. Romine, 38 Neb. 736, 57 N. W. 523; Cheney v. Patton, 134 Ill. 422, 25 N. E. 792; Goddard v. Benson, 15 Abb. Prac. (N. Y.) 191.

[705] Gibson v. Parlin, 13 Neb. 292, 13 N. W. 405.

[706] Theller v. Hershey (C. C.) 89 Fed. 575.

[707] Lynde v. Columbus, C. & I. C. R. Co. (C. C.) 57 Fed. 993; Spaulding v. Baldwin, 31 Ind. 376; Wickersham v. Johnson, 51 Mo. 313; Puckett v. Waco Abstract & Investment Co., 16 Tex. Civ. App. 329, 40 S. W. 812; Clark v. Nordholt, 121 Cal. 26, 53 Pac. 400; Fisher v. Kelly, 30 Or. 1, 46 Pac. 146.

diction, it would be necessary, at common law, to set forth all the facts conferring jurisdiction; but in many of the states, this rule has been changed by statute, the provision being that, in pleading a judgment of such a court, it shall be sufficient to allege that the judgment was "duly given or made." [708] And according to the practice now prevailing in some of the states, in a pleading to avoid the estoppel of a judgment, it is sufficient to allege that it was obtained by fraud (if such be the case), without stating the facts which constitute the fraud.[709] In an action for an injunction, a plea of former adjudication, which sets up a public record of the same court in which the action is pending, need not be verified.[710]

§ 791. Judgment Recovered after Institution of Second Suit.

The fact that a judgment was obtained after the commencement of the suit in which it is pleaded does not prevent its being a bar. It is the first judgment for the same cause of action that constitutes an effective defense, without regard to the order of time in which the suits were commenced.[711] Hence it even follows that a prior judgment upon the same cause of action sustains the plea of a former recovery although the judgment is in an action commenced subsequent to the one in which it is pleaded.[712] According to the practice in Georgia, "former recovery or pendency of another suit for the same cause of action and between the same parties, is matter in abatement, and must be taken advantage of at the first term, or if occurring afterwards, in the progress of the trial, so soon as may be after it occurs." [713]

[708] See Rev. St. Mo. 1899, § 2079; Rev. St. Wis. § 2673; Civ. Code Ky. § 122; Code Civ. Proc. N. Y. § 532; State v. Johnson, 78 Mo. App. 569; Garner v. Wills, 92 Ky. 386, 17 S. W. 1023; Pierstoff v. Jorges, 86 Wis. 128, 56 N. W. 735, 39 Am. St. Rep. 881; Schnitzer v. Fox, 31 Misc. Rep. 28, 62 N. Y. Supp. 1127.

[709] Edgell v. Sigerson, 20 Mo. 494.

[710] Detroit, L. & N. R. Co. v. McCammon, 108 Mich. 368, 66 N. W. 471.

[711] Jones v. Ellison, 10 Wkly. Notes Cas. (Pa.) 205; Finley v. Hanbest, 30 Pa. 190; Marble v. Keyes, 9 Gray (Mass.) 221; Stevens v. Briggs, 14 Vt. 44, 39 Am. Dec. 209; Nave v. Adams, 107 Mo. 414, 17 S. W. 958, 28 Am. St. Rep. 421; Mandeville v. Avery, 63 Hun, 624, 17 N. Y. Supp. 429; David Bradley Mfg. Co. v. Eagle Mfg. Co., 6 C. C. A. 661, 57 Fed. 980; Eckert v. Binkley, 134 Ind. 614, 34 N. E. 441.

[712] Duffy v. Lytle, 5 Watts (Pa.) 120.

[713] Merritt v. Bagwell, 70 Ga. 578.

CHAPTER XX.

JUDGMENTS IN REM.

§ 792. Definitions.
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§ 792. Definitions.

Between judgments in personam and judgments in rem there are radical and important differences. Hitherto we have treated of the former class of adjudications and their various characteristics and effects; we come now to consider the latter species of decrees. While the fundamental distinctions between these two varieties of judgments are easily apprehended, well worked out in the books, and practically very well understood, it has always been found difficult to formulate a satisfactory definition of the term "in rem." As a matter of scientific accuracy it is to be regretted that the phrase does not admit of a definition at once comprehensive and exact. But since the authorities are substantially agreed as to what particular proceedings are of this nature and what are not (as will appear from the following pages), we shall be content to quote some of the best definitions in the books, indicating the various criticisms to which they are open.

Chief Justice Marshall once observed that he had always understood that "where the process is to be served on the thing itself, and where the mere possession of the thing itself, by the service of the process and making proclamation, authorizes the court to decide upon it without notice to any individual whatever, it is a proceeding in rem, to which all the world are parties." [1] But this is not so much a definition as a test, having reference solely to the question of jurisdiction. Besides, it leaves out of view the important classes of cases in which the proceeding is not taken against a specific object of property, but has for its purpose an adjudication upon status. A nearer approach to a complete definition was made by the supreme court of Vermont, in the following terms: "A judgment in rem I understand to be an adjudication pronounced upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose. It differs from a judgment in personam in this, that the latter judgment is, in form as well as substance, between the parties claiming the right, and that it is so inter partes appears by the record itself. It is binding only upon the parties appearing to be such by the record and those claiming by them. A judgment in rem is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject-matter itself whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself, and the judgment is a solemn declaration upon the status of the thing, and it ipso facto renders it what it declares it to be." [2] But this definition also is too narrow. It does not specifically include the class of cases particularly described in the definition first quoted, nor proceedings such as those frequently taken for the enforcement of municipal tax-liens and the like. The same objection avails against the definition given by Mr. Smith, which is substantially the same as the last, viz., "an adjudication upon the status of some particular subject-matter by a tribunal having competent authority for that purpose, ... a solemn declaration proceeding from an accredited quarter concerning the status of the thing adjudicated upon, which very declaration operates accordingly upon the status

[1] Mankin v. Chandler, 2 Brock. 125, Fed. Cas. No. 9,030.
[2] Woodruff v. Taylor, 20 Vt. 65.

of the thing adjudicated upon, and ipso facto renders it such as it is thereby declared to be." [8] If we enlarge this description so as to make it include the class of adjudications above mentioned, it will probably make as close an approach to a complete definition as the nature of the subject admits.

§ 793. Judgments Quasi in Rem.

Much of the uncertainty and confusion in the definitions of proceedings in rem has arisen from the attempt to make that term cover various classes of actions which are not strictly and purely in rem, although they exhibit some points of analogy or resemblance to the proceedings which fall within the narrower use of the phrase. It is better to distinguish between proceedings in rem and proceedings quasi in rem. The latter are assimilated to the former in some particulars,—as, in respect to the manner of acquiring jurisdiction,—but are not always attended by the same consequences—in respect, for example, to the persons bound by the adjudication. To make this more plain, we extract the following description of the two classes from a well considered opinion of the United States supreme court: "Actions in rem, strictly considered, are proceedings against property only, treated as responsible for the claims asserted by the libelants or plaintiffs. The property itself is in such actions with the defendant, and, except in cases arising during war, for its hostile character, its forfeiture or sale is sought for the wrong in the commission of which it has been the instrument, or for debts or obligations for which by operation of law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant

[8] 2 Smith's Lead. Cas. 585. Those who desire to seek further for a satisfactory definition of this term may consult the following authorities: 2 Phil. Ev. p. 5; 1 Whart. Ev. § 815; Bigelow, Estop. p. 10 et seq.; Freem. Judgm. § 606; 1 Greenl. Ev. §§ 525, 541; Cross v. Armstrong, 44 Ohio St. 623, 10 N. E. 160; The Sabine, 101 U. S. 388, 25 L. Ed. 982; Pennoyer v. Neff, 95 U. S. 734, 24 L. Ed. 565; Windsor v. McVeigh, 93 U. S. 279, 23 L. Ed. 914; Freeman v. Alderson, 119 U. S. 187, 7 Sup. Ct. 165, 30 L. Ed. 372; The J. W. French (D. C.) 13 Fed. 916; Lord v. Chadbourne, 42 Me. 429, 443, 66 Am. Dec. 290; People v. Rodgers, 118 Cal. 393, 46 Pac. 740.

in the case. There is, however, a large class of cases which are not strictly actions in rem, but are frequently spoken of as actions quasi in rem, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages and other liens. Indeed, all proceeding having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated. But they differ, among other things, from actions which are strictly in rem, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties." [4] The distinction may be further illustrated by some examples taken from the books. Thus partition proceedings, or proceedings to quiet title, or to remove clouds from title, it is held, are analogous to proceedings in rem; wherefore publication of notice by advertisement is sufficient to apprise a party of the proceeding and bind his interest.[5] So, in a proceeding by a railroad company to acquire the right to use the track of another company for the purposes of its

[4] Freeman v. Alderson, 119 U. S. 187, 7 Sup. Ct. 165, 30 L. Ed. 372. A decree in a suit by creditors against the debtor and a corporation that certain goods were the property of the debtor, and subject to his debts, is a judgment in rem, binding on the creditors of the corporation. Ex parte Kenmore Shoe Co., 50 S. C. 140, 27 S. E. 682.

[5] Pillsbury's Lessee v. Dugan's Adm'r, 9 Ohio, 117, 34 Am. Dec. 427. Compare Childs v. Hayman, 72 Ga. 791. "Proceedings in partition or to quiet title are not strictly proceedings in rem, for they are not taken directly against property, but they are regarded, so far as they affect property, as proceedings in rem sub modo, in respect of which, while there must be reasonable notice to the parties, personal service is not essential to jurisdiction, and constructive service may be substituted." Meyer v. Kuhn, 25 U. S. App. 174, 13 C. C. A. 298, 65 Fed. 705, citing Arndt v. Griggs, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918. And see Loring v. Hildreth, 170 Mass. 328, 49 N. E. 652. But a suit to determine the title of land lying in another state from that in which the suit is brought is purely in personam, and the decree therein rendered does not operate directly on the property or affect the title, but is made effectual only by coercion of the parties, and binds only them and their privies. Dull v. Blackman, 169 U. S. 243, 18 Sup. Ct. 333, 42 L. Ed. 733.

business, the applicant will be concluded by a former adjudication against its corporate existence, had on a like application as to a third corporation.[6] So it is said that the determination of an assignee for the benefit of creditors, that a creditor is entitled to participate in the fund, is a judgment in rem, definitely fixing the status of the plaintiff towards the property.[7] But on the other hand, "a decree declaring the invalidity of a patent is in no sense a proceeding in rem, and does not prevent the same or a different plaintiff from prosecuting a suit against another defendant, and establishing its validity upon different or even upon the same evidence." [8]

§ 794. Jurisdiction.

It is a distinguishing peculiarity of a proceeding in rem that the jurisdiction of the court, in the particular case, rests merely upon the seizure or attachment of the property. No personal notice to any individual is required. The res, being brought within the jurisdiction of the court, becomes subject to its adjudication, and all parties interested are supposed to be duly apprised of the proceedings, by the mere taking of the property, or by the usual proclamation or published notice.[9] This jurisdiction empowers the court to adjudicate upon the status of the res, or to order it to be disposed of in a given way, according to the object of the action. Of course it does not authorize the fastening of a personal liability upon any individual not personally served. The jurisdiction is over the thing itself, and only the thing itself can be disposed of, though the rights of owners or claimants may be incidentally affected. Hence also, in proceedings of this character, exclusive jurisdiction, for the purposes of its own suit, is acquired by the court which first takes pos-

[6] In re Brooklyn, W. & N. R. Co., 19 Hun (N. Y.) 314.

[7] Eppright v. Kauffman, 90 Mo. 25, 1 S. W. 736.

[8] Consolidated Roller-Mill Co. v. George I. Smith Middlings Purifier Co. (C. C.) 40 Fed. 305, citing Ingersoll v. Jewett, 16 Blatchf. 378, Fed. Cas. No. 7,039. But the construction of a patent in an action is conclusive in another action by the patentee against a third person, where no new defenses are interposed. National Folding Box & Paper Co. v. American Paper Pail & Box Co. (C. C.) 48 Fed. 913.

[9] The Globe, 2 Blatchf. 427, Fed. Cas. No. 5,483. And see Fowler v. Brown, 51 Neb. 414, 71 N. W. 54.

session of the res.[10] But where the proceeding is not strictly in rem, but belongs to the class of actions which are only quasi in rem, the court cannot render a judgment which shall be valid against the rights of third persons, unless it is shown that such third persons have voluntarily appeared and become parties to the suit, or have had legal notice of the pendency of the suit and an opportunity to be heard therein.[11]

§ 795. Effect of Adjudications in Rem.

A judgment in personam, as we have already seen, is conclusive and binding only upon the parties to the action and those in privity with them, but not upon strangers. A judgment in rem, on the other hand, is conclusive and binding, not only upon parties and privies, but also upon strangers,—upon all persons interested.[12] It is commonly said that such a judgment binds "all the world." It is more accurate to say that the judgment is conclusive against any person, in any subsequent controversy, where the grounds of the adjudication, or the fact of its rendition, or any of its legal consequences, become relevant and material facts. But it must be noted that this broad conclusiveness belongs only to judgments strictly in rem. In those proceedings which we have designated as quasi in rem, the adjudication is, in general, conclusive only upon the persons directly and immediately concerned, or who were made parties by service of process. This will more fully appear, in connection with particular instances, in the following sections. And further, a judgment in rem of a domestic as well as a foreign court, where jurisdiction over the person of a party has not been obtained, except as to his interest in the property affected by the judgment, is not conclusive or binding upon him by way of estoppel in another

[10] Heidritter v. Elizabeth Oil-Cloth Co., 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729.

[11] Martin v. Darling, 78 Me. 78, 3 Atl. 118.

[12] Cammell v. Sewell, 3 Hurl. & N. 646; The Rio Grande v. Otis, 23 Wall. 458, 23 L. Ed. 158; Noble v. Thompson Oil Co., 79 Pa. 354, 21 Am. Rep. 66; State v. Central Pac. R. Co., 10 Nev. 80; Street v. Augusta Ins. & B. Co., 12 Rich. Law (S. C.) 13, 75 Am. Dec. 714; 2 Smith. Lead. Cas. 661; Bailey v. Sundberg (D. C.) 43 Fed. 81; Ballantyne v. Mackinnon [1896] 2 Q. B. 455.

action.[13] It has also been held that a judgment against a vessel (that being a judgment in rem and not enforceable against other property of the owner), if unsatisfied, cannot be pleaded as a bar to a subsequent suit against the owner of the vessel on the same contract.[14]

§ 796. Decrees in Admiralty.

Decrees rendered by the courts of admiralty come within the strictest definition of judgments in rem. When pronounced by a lawful court, which has duly acquired jurisdiction of the res, such a sentence is universally admitted to be binding and conclusive upon all persons who have or may claim an interest in the property, the supposition being that the seizure or arrest of the thing affords notice of the proceeding to all persons concerned.[15] But, as in all other cases, the conclusiveness of the judgment does not extend beyond the matters actually decided by it. Thus a decree on a libel in rem against a ship, for supplies furnished her, does not necessarily determine the title to the vessel, and therefore is not competent in a subsequent action as evidence of the ownership of the supplies so obtained, without other proof of the title to the ship.[16] A suit to enforce a maritime lien, being a proceeding in rem, is not barred by a personal judgment previously recovered for the same debt.[17]

[13] Durant v. Abendroth, 97 N. Y. 132.

[14] Toby v. Brown, 11 Ark. 308; supra, § 674.

[15] Averill v. Smith, 17 Wall. 95, 21 L. Ed. 613; The Propeller Commerce, 1 Black, 580, 17 L. Ed. 107; The Mary Anne, 1 Ware, 104, Fed. Cas. No. 9,195; Ballantyne v. Mackinnon [1896] 2 Q. B. 455. See China Mut. Ins. Co. v. Force, 66 Hun, 626, 20 N. Y. Supp. 796.

[16] Van Vechten v. Griffiths, 4 Abb. Dec. (N. Y.) 487. See, also, Andrews v. Brown, 3 Cush. (Mass.) 130. A decree dismissing a libel in rem against a vessel to recover f r repairs does not constitute an adjudication of the nonliability of the owners, who, under admiralty rule 12, could not be joined as defendants in such suit, and who did not intervene therein, unless it clearly appears from the record that such issue was not only raised but decided, since its determination was not necessarily involved. Morris v. Bartlett, 47 C. C. A. 578, 108 Fed. 675.

[17] The Odorilla v. Baizley, 128 Pa. 283, 18 Atl. 511. See, also, Providence Washington Ins. Co. v. Morse (D. C.) 35 Fed. 363.

§ 797. Judgments in Prize Cases.

The most familiar, as well as the most perfect, example of a judgment in rem, pure and simple, is the decree of a court of admiralty condemning a vessel as prize. Such an adjudication is final and conclusive evidence, both as to the fact of the legality of the seizure and as to the grounds of condemnation, upon all persons whatever. "The sentence of a court of admiralty, or of appeal, in questions of prize, binds all the world as to everything contained in it, because all the world are parties to it. The sentence, so far as it goes, is conclusive as to all persons." [18] The books contain much learning upon this point, but as the question of the binding character of such sentences has almost invariably arisen in cases where the judgment was one pronounced by a foreign tribunal, we shall postpone the detailed consideration of the subject to the chapter on foreign judgments.[19]

§ 798. Judgments in Collision Cases.

Decrees in admiralty rendered in cases of collisions between vessels, ascertaining where the fault lay and awarding damages, stand upon the same footing with prize sentences in respect to their conclusiveness. Thus, in an action on a policy of insurance for loss occasioned by a collision at sea between another vessel and the one insured, a libel and decree against the vessel insured, in a proceeding in rem in the admiralty court for damage done to the other vessel by the collision, was held to be sufficient evidence as well of the collision as of the negligence of the master and crew of the vessel insured.[20] But where the owner of a vessel which was sunk by collision with a steamer brought a libel in rem, and the steamer was attached, but no notice was given or publication made as required by admiralty rule 9, and subsequently the steamer was released on

[18] Penhallow v. Doane, 3 Dall. 54, 86, 1 L. Ed. 507. And see Croudson v. Leonard, 4 Cranch, 434, 2 L. Ed. 670; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600, Fed. Cas. No. 1,793; Hughes v. Cornelius, 2 Show. 232.

[19] See, infra, §§ 813–817.

[20] Street v. Augusta Ins. & Banking Co., 12 Rich. Law (S. C.) 13, 75 Am. Dec. 714.

her owner's giving a bond to the libelant for less than her value, it was held that a decree dismissing the libel was binding on the libelant only, and would not prevent a new libel by the owner of the cargo.[21] So, a default decree against a tug for damages caused to her tow by stranding is not conclusive of negligence on the part of the pilot in charge of the tug, so as to preclude him, after obtaining a decree against the tug for his wages, from denying such negligence in a contest between himself and the owner of the tow as to whose decree should be first paid out of the proceeds of the tug.[22]

§ 799. Condemnation of Goods Seized under Excise or Revenue Laws.

A judgment rendered by a competent court, declaring the condemnation or forfeiture of goods seized for a breach of the excise or revenue laws, is strictly in rem, and is binding and conclusive upon all persons, so that the legality of the seizure cannot be again contested in any proceeding, nor will trespass lie against the officer who took the goods, for the purpose of trying the question anew.[23] In one of the English cases it appears that the action was for the price of liquor sold by the plaintiff, and the defense was interposed that the liquor was adulterated, to prove which fact the defendant offered in evidence the record of its condemnation in the Court of Exchequer. It was held that the record was admissible, as that proceeding was in rem.[24] But it has been held that proceedings under the confiscation acts of congress, while in the nature of proceedings in rem, operated only to divest the title of the party alleged to be the owner of the property seized, and judgment of confiscation and forfeiture did not divest or affect the title of third persons originating prior to the seizure or of the real owner not proceeded against.[25] According to the federal supreme court, "the jurisdiction acquired by the seizure

[21] Bailey v. Sundberg, 1 U. S. App. 101, 1 C. C. A. 387, 49 Fed. 583.

[22] Flannery v. The Alexander Barkley (D. C.) 83 Fed. 846.

[23] Scott v. Shearman, 2 Wm. Bl. 977; Whitney v. Walsh, 1 Cush. (Mass.) 29, 48 Am. Dec. 590; Buchannan v. Biggs, 2 Yeates (Pa.) 232; Gelston v. Hoyt, 13 Johns. (N. Y.) 561; Kriess v. Faron, 118 Cal. 142, 50 Pac. 388.

[24] Hart v. McNamara, 4 Price, 154, note.

[25] Risley v. Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421. See, also, Dean v. Chapin, 22 Mich. 275.

[of property in a proceeding in rem for its condemnation for alleged forfeiture] is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and to be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. The manner of notification is immaterial, but the notification itself is indispensable." [26]

§ 800. Acquittal of Goods Seized.

A sentence of acquittal of goods seized for an alleged breach of the excise or revenue laws, or other cause of forfeiture, is likewise conclusive of the illegality of the seizure and bars any further examination of that question. This point was ruled by Chancellor Kent in the case of Gelston v. Hoyt.[27] "The law is to be understood," he said, "as settled clearly, uniformly, and definitely, that if goods are seized by a custom-house officer, and are libelled, tried, and condemned in the exchequer, district, or other court having cognizance of the forfeiture, and the seizing officer be afterwards sued in trespass for taking the goods, he may plead that condemnation in bar of the action. So far we have proceeded with perfect assurance. The next question then is, suppose the goods to be seized, tried, and acquitted in the district court, and the officer be then sued for seizing the goods, can the officer contest the legality of the seizure over again, or can the owner, in his turn, set up the sentence of acquittal as a bar to that inquiry? This is the very point and pith of the controversy, and I entertain no doubt it is equally well settled as the other, and that if the condemnation is a bar to the action on the one hand, the acquittal is a bar to the defense on the other. It would be monstrously unjust and repugnant to all principle if the rule were not so. Ought not the parties to be placed upon equal ground? And if the sentence of condemnation be conclusive in favor of the seizing officer,

[26] Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914.
[27] 13 Johns. (N. Y.) 561. See, also, Cooke v. Sholl, 5 Term R. 255.

ought not the sentence of acquittal to be conclusive against him? The most obvious dictates of justice will teach every man of common understanding that the rule, to be just, should be equal and impartial in its operation." This case was carried to the United States supreme court, where an instructive opinion was delivered by Judge Story, and the ruling of the court below was affirmed.[28]

§ 801. Attachment Proceedings.

A proceeding by attachment of property, though often spoken of as a proceeding in rem, and though it does to some extent partake of the characteristics of that species of actions, cannot be admitted to come within the strict meaning of the term. It shares also in the character of a purely personal action, and instead of binding all the world, the judgment is conclusive only upon the actual parties to the litigation and those in privity with them.[29] "The difference between proceedings by attachment and proceedings in rem, properly so called, arises from the fact that while the latter are directed primarily against things themselves, and only operate incidentally on the rights of parties, the former use the hold obtained by the seizure of specific property merely as a means of reaching and giving effect to the rights of parties, and neither claim nor exercise any controlling authority over the title of strangers. The same remark applies to replevin."[30] And as remarked by the supreme court of Mississippi, "such suits are also proceedings in personam, since it is the personal obligation of the defendant owner which is the foundation of the suit, and it is not necessary that the property seized should have had any sort of connection with the contract sued on. The property seized is not the debtor

[28] Gelston v. Hoyt, 3 Wheat. 246, 4 L. Ed. 381.

[29] Cooper v. Reynolds, 10 Wall. 316, 19 L. Ed. 931; Maxwell v. Stewart, 22 Wall. 77, 22 L. Ed. 564; Megee v. Beirne, 39 Pa. 50; Breading v. Siegworth, 29 Pa. 396; Childs v. Digby, 24 Pa. 23; Mankin v. Chandler, 2 Brock. 125, Fed. Cas. No. 9,030; Woodruff v. Taylor, 20 Vt. 65. See Peterson v. Willard, 17 La. Ann. 93; National Bank of St. Joseph v. Peters, 51 Kan. 62, 32 Pac. 637; Johnson v. Stockham, 89 Md. 368, 43 Atl. 943. Where a creditor in attachment against the debtor obtains a judgment and a sale of the property attached, the judgment is not binding upon another creditor who has a prior and valid chattel mortgage, and who was not a party to the attachment suit. Gleason v. Wilson, 48 Kan. 500, 29 Pac. 698.

[30] 2 Smith, Lead. Cas. 690.

to the plaintiff, but stands in the suit in which it is attached as the representative of its owner the defendant. The right to attach is simply the right to seize the property of the debtor and to deal with it as his representative. By the seizure of the thing the right becomes initiate, and is consummated by the recovery of the judgment against the owner." [31]

But it must be remembered that a suit by attachment against a nonresident or absconding debtor, being a proceeding in rem, operates only upon the property attached, and a judgment recovered therein imposes no sort of personal liability upon the defendant and does not affect him except in respect to his interest in the property attached.[32] Consequently, the judgment cannot operate as a bar to a subsequent suit for the collection of any balance remaining unpaid after exhausting the attached property,[33] nor can it be pleaded in bar of a subsequent suit by the debtor against the plaintiff on an existing claim not set off in the attachment suit.[34]

§ 802. Inquisitions of Lunacy.

It would appear that an inquisition upon a writ de lunatico inquirendo should be considered in the strictest sense a proceeding in rem, since its sole and essential object is to obtain an adjudication upon status, that is, upon the condition of the person with reference to his sanity. Yet the courts are all agreed in holding that the finding made upon such an inquisition, especially if retrospective, is not conclusive evidence, though it may be prima facie, against persons who were not specifically made parties to the proceeding.[35] Thus a finding that, at the time of the execution of a deed, the

[31] Sale v. French, 61 Miss. 170.

[32] Soulard v. Vacuum Oil Co., 109 Ala. 387, 19 South. 414. See, supra, § 229; infra, § 904.

[33] Oil Well Supply Co. v. Koen, 64 Ohio St. 422, 60 N. E. 603.

[34] Baldwin v. Woodbridge & Turner Engineering Co., 59 N. J. Law, 317, 36 Atl. 683.

[35] Rogers v. Walker, 6 Pa. 373, 47 Am. Dec. 470; Den ex dem. Aber v. Clark, 10 N. J. Law, 217, 18 Am. Dec. 417 (citing Sergeson v. Sealey, 2 Atk. 412; Ex parte Barnesley, 3 Atk. 184; Hall v. Warren, 9 Ves. 603; Faulder v. Silk, 3 Camp. 126); Thomasson v. Kercheval, 10 Humph. (Tenn.) 322; Hughes v. Jones, 116 N. Y. 67, 22 N. E. 446, 5 L. R. A. 637, 15 Am. St. Rep. 386.

grantor was of unsound mind, is presumptive but not conclusive evidence of the grantor's incapacity in an action wherein a party claims under the deed.[36]

§ 803. Decrees of Divorce.

A proceeding in divorce is in some sense and for some purposes in personam. But since its prime object is to dissolve the marital relation heretofore subsisting between the parties, and thereby to adjudicate upon their status, it is strictly and truly a proceeding in rem. Important consequences flow from this doctrine. For first, the proceeding being in rem, it is evident that jurisdiction of the res will in itself be sufficient to authorize the sentence pronounced, without personal service of process upon the defendant. And secondly, in so far as the judgment determines the status of the applicant, it is a judgment that is operative and conclusive as to all the world.[37] In practice, the opportunity to apply these principles has chiefly arisen in connection with decrees of divorce emanating from the courts of foreign countries or of a sister state, and hence the subject properly belongs to a later portion of our work.[38] It must be here observed, however, that it is only in the character of an adjudication upon status that a decree of this character can have universal validity or be supported upon the kind of jurisdiction above indicated. In so far as it transcends these limits and undertakes to determine incidental or collateral matters, it is purely in personam and to be tested and governed by the rules ordinarily applying to

[36] Van Deusen v. Sweet, 51 N. Y. 378. An adjudication of mental unsoundness, per se, is evidence only of the mental condition of the subject at the time of such adjudication and thereafter; it cannot relate back presumptively to a prior date, as evidence of his mental condition at such date. But where it is shown that the same condition of mind has existed in a person for a considerable period of time prior to the adjudication of insanity, such adjudication is competent evidence, where the act claimed to have been affected by such condition occurred within such prior time. Small v. Champeny, 102 Wis. 61, 78 N. W. 407.

[37] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Hood v. Hood, 110 Mass. 463; Burlen v. Shannon, 3 Gray (Mass.) 387; Smith v. Smith, 13 Gray (Mass.) 209; 2 Bish. Mar. & Div. § 755.

[38] See, infra, §§ 822, 924–933.

that species of judgments.[39] This also will more fully appear in the later discussions concerning foreign and sister state judgments.

§ 804. Orders of Naturalization.

Under the naturalization laws of the United States, the record of the admission of an alien to citizenship in any court authorized to perform the act, reciting the facts which entitle the alien to such judgment, is a record which imports absolute verity, and its recitals cannot be questioned or contradicted in any collateral proceeding.[40] The cases establishing this rule may not expressly declare such a judgment to be a judgment in rem, but they implicitly hold it to be such, inasmuch as they give it precisely the effect of an adjudication of that character. And this conforms to legal reason, since the purpose of the proceeding is to change the party's status from that of alienage to that of citizenship.

§ 805. Settlement of a Pauper.

Under the English poor laws, and similar statutes existing in some of our states, an order made by the proper authority for the removal of a pauper, finding his legal settlement to be in such a place, is a judgment in rem and is conclusive upon all the world as to the fact of such settlement.[41] In Vermont, such an order is conclusive not only of the facts directly in issue and decided but also of all facts necessary to the decision reached. As, where an illegitimate child was removed to the defendant town, and the order was not appealed from, and afterwards the mother was removed to the same town, on an appeal from the last removal it was held that, as by the statute the settlement of the child followed that of the mother, the settlement

[39] See Roe v. Roe, 52 Kan. 724, 35 Pac. 808, 39 Am. St. Rep. 367; Thompson v. Thompson, 132 Ind. 288, 31 N. E. 529; Gray v. Thomas, 83 Tex. 246, 18 S. W. 721; Corry v. Lackey, 105 Mich. 363, 63 N. W. 418.

[40] McCarthy v. Marsh, 5 N. Y. 263; State v. Hoeflinger, 35 Wis. 393; State v. Penney, 10 Ark. 621.

[41] Reg. v. Inhabitants of Township of Hartington, Middle Quarter, 4 El. & Bl. 780; Rex v. Inhabitants of Cirencester, Burrows, Sett. Cas. 18; Rex v. Inhabitants of Bentley, Id. 426; Town of Cabot v. Town of Washington, 41 Vt. 168; West Buffalo v. Walker Tp., 8 Pa. 177.

of the mother was an essential fact in establishing the settlement of the child on the former order, and the decision and order in the child's case was conclusive as to the settlement of the mother in the case at bar, she having acquired no subsequent settlement.[42] In Pennsylvania, an order of removal of a pauper, when confirmed, is conclusive against the appellant in favor of all the world; when discharged, it is conclusive between the parties litigant; when quashed, it is conclusive on neither.[43] In Connecticut, however, these rules do not apply. In that state, a judgment in an action by one town against another for supplies furnished to a pauper claimed to belong to the defendant town, in which the settlement of the pauper is declared to be in that town, is not a judgment in rem, and is binding only on the parties to that suit and those in privity with them.[44]

§ 806. Questions of Identity, Legitimacy, and Pedigree.

It is held that a decree, foreign or domestic, establishing a pedigree, is a decree in rem and binding and conclusive upon all the world as to the matters which are thereby adjudicated.[45] Similarly, a question of identity of the defendant, contested in a former suit and found against him, cannot be re-examined.[46] But on the other hand, a judgment finding the illegitimacy of a son is not evidence in another suit to show the non-marriage of the mother or the illegitimacy of her other children.[47] So also, although the condition of slavery was in the strictest sense a status, the highest court in this country held that a judgment establishing the freedom of a given person was not in rem, but bound only parties and privies.[48] But in the case of a child claiming to be free and not a slave, because her mother, in a suit wherein the same person was a party claiming the services of both, was adjudged free, on an allegation appearing on the record that the mother was free when the child was born, it was held that

[42] Pittsford v. Chittenden, 58 Vt. 49, 3 Atl. 323.
[43] West Buffalo v. Walker Tp., 8 Pa. 177.
[44] Town of Bethlehem v. Town of Watertown, 47 Conn. 237.
[45] Ennis v. Smith, 14 How. 400, 14 L. Ed. 472.
[46] Verneuil v. Harper, 28 La. Ann. 893.
[47] Kearney v. Denn, 15 Wall. 51, 21 L. Ed. 41. See Ferrell v. Broadway, 127 N. C. 404, 37 S. E. 504.
[48] Davis v. Wood, 1 Wheat. 6, 4 L. Ed. 22.

the judgment was conclusive as to the freedom of the child. The decision was put on the ground that the child was "privy in blood" to the mother, and privy in estate so far as regarded the mother's condition of servitude or otherwise.[49] But we think the court, in either of these cases, might well have held the judgment to be strictly in rem.

§ 807. Bankruptcy and Insolvency.

A decree of the court having jurisdiction under the bankrupt law, upon a petition in involuntary proceedings, whereby the debtor is adjudged and declared a bankrupt, is in the nature of a decree in rem, since it determines his legal status in that respect, and is therefore notice, of itself, to all creditors, and is conclusive evidence that all the facts necessary to sustain the decree were proved before the court.[50] Similarly, an adjudication of insolvency partakes of the nature of a judgment in rem; it binds all persons, whether parties or otherwise, and whether notified or not, as to the particular matter determined.[51] But while an adjudication of bankruptcy is conclusive upon all persons as to the bankruptcy of the debtor, and as to all facts necessary to warrant the adjudication, it is not final evidence upon matters which came in question only collaterally or by way of evidence. Thus, in one of the cases arising under the bankruptcy act of 1898, the respondent in a petition in involuntary bankruptcy denied his alleged indebtedness to the petitioning creditor, and took issue on the validity and consideration of the note set forth in the petition and on which the creditor claimed. Evidence on this point was presented on both sides, and the court found the allegations of the

[49] Alexander v. Stickely, 7 Serg. & R. (Pa.) 299.

[50] Shawhan v. Wherritt, 7 How. 627, 12 L. Ed. 847; Michaels v. Post, 21 Wall. 398, 22 L. Ed. 520; In re Wallace, Deady, 433, Fed. Cas. No. 17,094; Morse v. Godfrey, 3 Story, 391, Fed. Cas. No. 9,856; In re Banks, 1 N. Y. Leg. Obs. 274, Fed. Cas. No. 958; In re Fallon, 2 N. B. R. 277, Fed. Cas. No. 4,628; In re Ordway, 19 N. B. R. 171, Fed. Cas. No. 10,552; Lewis v. Sloan, 68 N. C. 557; Benedict v. Smith, 48 Mich. 593, 12 N. W. 866; Rayl v. Lapham, 27 Ohio St. 452; Thornton v. Hogan, 63 Mo. 143; Mount v. Manhattan Co., 41 N. J. Eq. 211, 3 Atl. 726.

[51] Brown v. Smart, 69 Md. 320, 14 Atl. 468; Merriam v. Sewall, 8 Gray (Mass.) 316. See Diamond State Iron Co. v. Alex. K. Rarig Co., 93 Va. 595, 25 S. E. 894.

petition to be true and made the adjudication of bankruptcy as prayed. It was held that such adjudication was conclusive evidence of the petitioner's claim, so that the note could not be disputed when it was presented for allowance as a claim against the bankrupt's estate, either by the bankrupt or by any creditor who joined in the proceedings and opposed the adjudication. But the bankrupt had also taken issue on the question of his insolvency, and the petitioning creditor, for the purpose of proving insolvency, offered in evidence certain promissory notes made by the debtor to third parties, and the debtor contested their validity and consideration. And though the court found the debtor insolvent and adjudged him bankrupt, yet it was held that the adjudication was not conclusive as to the validity of those notes, so as to preclude the bankrupt from opposing their allowance as claims against his estate, for they were not directly in issue, but only collaterally brought in question, and the holders were not parties to the proceeding.[52]

For similar reasons, it is held that a decree granting a discharge to a bankrupt, or to an insolvent debtor, is conclusive evidence of his having complied with all things required by law to entitle him to a discharge, and of his release from all debts and obligations not excepted by law from the operation of such a discharge. It is binding upon all creditors, whether or not they were notified of the application or took part in the proceedings; and it cannot be impeached in any collateral proceeding, but only directly and in the manner prescribed by the statute itself.[53] In a later chapter we shall be called upon to consider the important subject of the extraterritorial effect of decrees in bankruptcy and the question of the conclusiveness of foreign adjudications upon domestic creditors.[54]

[52] In re Henry Ulfelder Clothing Co. (D. C.) 98 Fed. 409. And see Baker v. Wyman, 47 Minn. 177, 49 N. W. 649.

[53] Lathrop v. Stuart, 5 McLean, 167, Fed. Cas. No. 8,113; Thurmond v. Andrews, 10 Bush. (Ky.) 400; Blake v. Bigelow, 5 Ga. 437; Boas v. Hetzel, 3 Pa. 298; Sheets v. Hawk, 14 Serg. & R. 173, 16 Am. Dec. 486. See Bankr. Act 1898, § 21f.

[54] Infra, § 824.

§ 808. Probate Adjudications.

The judgments and decrees of courts of probate, acting within the scope of their peculiar jurisdiction, are quasi in rem, and are binding and conclusive upon all parties in interest, without notice other than such general notice as may be given by publication to all persons interested in the estate.[55] Thus, a judgment of a probate court that one of the heirs of an estate had received advancements during the intestate's lifetime to the full amount of his share of the estate, and that he was not entitled to any further share therein, is binding on the creditors of the heir, though they had no personal notice of the proceeding.[56] So a suit to test the validity of a will is a proceeding in rem, and the decree is binding upon all parties in interest whether parties to the issue or not.[57] But it has been held that a suit for the construction of a testamentary writing is not in the nature of a proceeding in rem.[58]

§ 809. Judgments for Taxes and Assessments.

State laws not infrequently provide that taxes and assessments shall be collected by proceedings taken primarily against the land which is liable, with publication of notice to owners and claimants. And in some jurisdictions, a proceeding of this character is regarded as strictly in rem.[59] Thus, where land of a nonresident has been sold for taxes, and the title quieted in the purchaser on service by publication, the decree quieting the title divests the nonresident owner of all interest in the land.[60] But more commonly the judgment in a tax case is considered to be binding only upon parties brought in by actual notice and those in privity with them, and in

[55] Lynch v. Baxter, 4 Tex. 431, 51 Am. Dec. 735; Miller v. Foster, 76 Tex. 479, 13 S. W. 529; Mulcahey v. Dow, 131 Cal. 73, 63 Pac. 158; Hanley v. Hanley, 114 Cal. 690, 46 Pac. 736; supra, §§ 635, 638, and cases there cited.

[56] Liginger v. Field, 78 Wis. 367, 47 N. W. 613.

[57] Fry v. Taylor, 1 Head. (Tenn.) 594; Patton v. Allison, 7 Humph. (Tenn.) 320.

[58] Brown v. Brown, 86 Tenn. 277, 7 S. W. 640.

[59] Mayo v. Ah Loy, 32 Cal. 477, 91 Am. Dec. 595. And see Black, Tax Titles, § 167 et seq.

[60] Oldham v. Stephens, 45 Kan. 369, 25 Pac. 863.

some cases, not even upon the owner unless he appeared and contested the application for judgment.[61] Thus, in Indiana, where land is erroneously taxed to another than the true owner, a judgment foreclosing the tax lien against the person to whom the land was taxed, in an action to which the owner was not a party, and of which he had no knowledge, is not binding upon him.[62] In Wisconsin, the owner of a city lot, not being made a party to a proceeding by mandamus to compel the common council of the city to levy a special tax or assessment thereon, is not bound by the judgment in such proceeding.[63] A judgment in favor of a tax-sale purchaser, enforcing by mandamus against the sheriff his right to a deed, is not a judgment in rem, and is not admissible evidence against one neither party nor privy to the proceeding.[64]

§ 810. Foreclosure of Liens.

Proceedings to foreclose a lien are, generally speaking, proceedings in rem, and therefore personal service on absent parties is not essential to give the court jurisdiction.[65] So a judgment for the foreclosure of a mortgage, although in the commencement of the action it be in form in personam, yet as it awards a special execution against the premises described in the mortgage, and directs damages to be recovered by a sale of the same, is properly a judgment in rem or quasi in rem.[66]

[61] See Gage v. Bailey, 102 Ill. 11; Belleville Nail Co. v. People, 98 Ill. 39; People v. Brislin, 80 Ill. 423; Job v. Tebbetts, 5 Gilman (Ill.) 376; Mayo v. Foley, 40 Cal. 281; Jamison v. City of New Orleans, 12 La. Ann. 346; Gage v. Pumpelly, 115 U. S. 454, 6 Sup. Ct. 136, 29 L. Ed. 449.

[62] Grigsby v. Akin, 128 Ind. 591, 28 N. E. 180.

[63] Rork v. Smith, 55 Wis. 67, 12 N. W. 408.

[64] Waters v. Spofford, 58 Tex. 115.

[65] Oswald v. Kampmann (C. C.) 28 Fed. 36. See Lehman v. Hinton, 44 W. Va. 1, 29 S. E. 984; Bensimer v. Fell, 35 W. Va. 15, 12 S. E. 1078, 29 Am. St. Rep. 774; McCollum v. Wood (Tex. Civ. App.) 33 S. W. 1087.

[66] Russell v. Brown, 41 Ill. 184; Williams v. Ives, 49 Ill. 512; White's Adm'rs v. Williams, 3 N. J. Eq. 376. See Smith v. Kreager, 6 Kan. App. 27[illegible], 51 Pac. 813.

§ 811. Decrees of Sale.

In Louisiana, a judgment confirming and homologating a judicial sale of realty has the force of res judicata so as to operate "as a complete bar against all persons, whether of age or minors, whether present or absent, who may thereafter claim the property so sold, in consequence of all illegality or informality in the proceedings, whether before or after judgment." [67] On similar principles, a decree for the sale of the estate of a lunatic, for the payment of debts, is a decree in rem, and the creditors are bound by it though not parties to the proceeding, and a purchase of the property, with notice of the decree, at a sale under an execution at law issued after the entry of such decree, will be set aside.[68]

§ 812. Establishment of Roads and Boundaries.

A proceeding had in the proper court for the laying out of a public road is in the nature of a proceeding in rem and binds all the world.[69] So also the judgment of a competent court upon the report of a committee appointed under the provisions of a state statute empowering such court to establish the disputed boundary line between two adjoining towns, is a judgment in rem and conclusive upon all persons.[70]

[67] Jeter v. Hewitt, 22 How. 352, 16 L. Ed. 345; Montgomery v. Samory, 99 U. S. 482, 25 L. Ed. 375.

[68] Latham v. Wiswall, 37 N. C. 294.

[69] Millcreek Tp. v. Reed, 29 Pa. 195. See Bradbury v. Walton (Ky.) 21 S. W. 869.

[70] Pitman v. Town of Albany, 34 N. H. 577.

CHAPTER XXI.

FOREIGN JUDGMENTS.

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PART I. FOREIGN JUDGMENTS IN REM.

§ 813. Conclusiveness of Foreign Judgments in Rem.

A "foreign" judgment, as the term is used in the English books, means a judgment rendered by any court outside of England, including the courts of the British colonies. As used by American judges, the term has not a very precise signification. For sometimes it includes all judgments rendered by courts beyond the particular state,—in which sense a judgment pronounced in New York may be called a foreign judgment in Pennsylvania,—and sometimes it is restricted to judgments coming from without the limits of the United States. The latter usage is the better. For, in our law, there are important differences between judgments rendered in a sister state and those which are foreign in the strict sense, and the practice of indiscriminately grouping them under one general designation tends to obscure these distinctions and introduce misleading ideas. In this work, therefore, when speaking of the rulings of the American courts, we shall always use the phrase "foreign judgment" to designate one emananting from the courts of a country foreign to the United States, while the term "sister state judgment" will indicate one pronounced in one of the several states of the Union and used as a cause of action or defense in another. The former species of judgments will form the subject of the present chapter. And it will further be necessary to subdivide foreign judgments into judgments in rem and judgments in personam, these two classes being distinguished by certain important differences which will fully appear in the sequel. We proceed then to the consideration of the effect of judgments which are strictly foreign and in rem.

It has been the express doctrine of both the English and American courts from early times that a foreign judgment in rem is binding and conclusive on all the world, and not re-examinable on

the merits, provided the court had jurisdiction and there was no fraud in procuring the sentence.[1] "We should treat the judgment of a foreign court, acting in rem, within its appropriate power and jurisdiction, with the same respect and concede to it the same consequence that we would to similar judgments of the courts of our sister states. We should allow the party contesting its validity to show that it was procured by fraud, or that it is void on its face, or void by the local law, fori rei judicatæ. But such party cannot be permitted to show that he never had any notice of the suit, otherwise than by showing that the notice prescribed by the local law was not given, thereby proving the judgment to be void by that law. . . . . Nor can the party be allowed to show that there are errors in law on the face of the judgment, for that would compel our courts to sit in review on the adjudications of the foreign tribunal. When the foreign judgment produced in evidence appears to be regular in form, and to contain the essential parts of an adjudication of the controversy made between proper parties, the burden of showing its invalidity rests upon the party who desires to impeach it."[2] Thus, for example, where the matter in controversy is land or other immovable property, a judgment pronounced in the forum rei sitæ is of universal obligation as to all the matters of right and title which it professes to decide in relation thereto, and absolutely conclusive; while, on the other hand, a judgment in any foreign country (foreign to the situs of the res), touching such immovables, will be held of no obligation.[3]

§ 814. Decrees in Admiralty.

The most familiar examples of foreign judgments in rem are the adjudications of admiralty courts in cases of prize, collision, forfeiture, and the like. And these decrees, by the unanimous and emphatic voice of courts and jurists, are declared to be binding and

[1] Hughes v. Cornelius, 2 Show. 232; Bernardi v. Motteux, 2 Doug. 574; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; Wellborn v. Carr, 1 Tex. 463; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126.

[2] Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126, 183.

[3] Story, Confl. Laws. § 591; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126, 179. See, also, Cammell v. Sewell, 5 Hurl. & N. 728.

conclusive all over the world. Thus the sentence of a foreign court of admiralty, having jurisdiction under the law of nations, condemning a vessel and cargo as good and lawful prize, is conclusive upon all persons and in all courts, and cannot be disregarded or contradicted in any subsequent proceeding.[4] How firmly this principle is settled, and how faithfully the courts adhere to it, even in the most exceptional circumstances, might be proved by many interesting cases to be found in the books. For instance, in the case of The Helena,[5] the vessel was captured by a corsair belonging to the Dey of Algiers, and was taken into a port of that country and condemned and sold. The former owner contended that the seizure was piratical and not a lawful capture, and that the subsequent proceedings had no formality or regularity. But the court held that the property in the vessel had passed by the sale. Sir Wm. Scott observed: "Although their notions of justice to be observed between nations differ from those which we entertain, we do not on that account venture to call in question their public acts. As to the mode of confiscation which has taken place on this vessel, whether by formal sentence or not, we must presume it was regularly done in their way and according to the established custom of that part of the world." An even stronger illustration is furnished by the case of Armroyd v. Williams,[6] in which the sentence of a French prize court was held to be conclusive, although every consideration appeared to militate against the propriety of applying the established rule. But the court declared that, whatever might be done by foreign tribunals in reference to the settled principles of international law on the subject of the conclusiveness of prize adjudications, the courts of this country would not, for purposes of retaliation, depart from

[4] Hughes v. Cornelius, 2 Show. 232; Bernardi v. Motteux, 2 Doug. 574; Stringer v. Ins. Co., L. R. 4 Q. B. 676; Croudson v. Leonard, 4 Cranch, 434, 2 L. Ed. 670; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600, Fed. Cas. No. 1,793; Ocean Ins. Co. v. Francis, 2 Wend. (N. Y.) 64, 19 Am. Dec. 549; Lumly v. Quarry, 7 Mod. 9; Williams v. Armroyd, 7 Cranch, 423, 3 L. Ed. 392; Brown v. Union Ins. Co. at London, 4 Day (Conn.) 179, 4 Am. Dec. 204; Walton v. Bethune, 2 Brev. (S. C.) 453, 4 Am. Dec. 597; Cucullu v. La. Ins. Co., 5 Mart. (N. S.; La.) 464, 16 Am. Dec. 199.

[5] 4 C. Rob. Adm. 3 (1801).

[6] 2 Wash. C. C. 508, Fed. Cas. No. 538.

those principles. This was a strong position to take, considering the nature of our relations with France at that date (1811). The court, even in holding the sentence of condemnation conclusive, denounced it as "a daring outrage upon our neutral rights." The case was appealed to the supreme federal court, and it was there held that the sentence was none the less conclusive because it was given under an edict which was unjust in itself and in direct and flagrant violation of the law of nations, and which had been so declared by the United States government.[7] The converse of this rule also holds good. A sentence of acquittal pronounced by a foreign court acting in rem, in cases of prize, forfeiture, etc., is conclusive, in the absence of fraud or want of jurisdiction.[8]

The reasons why our courts accept such adjudications as final and conclusive are founded partly on the consideration that prize courts exist and discharge their functions under the recognition of the law of nations,—being thus, in some sense, a species of international tribunals, exercising an authority which must be respected by all countries which give their adherence to the jus gentium,[9]—and

[7] Williams v. Armroyd, 7 Cranch, 423, 3 L. Ed. 392.

[8] Magoun v. New England Marine Ins. Co., 1 Story, 157, Fed. Cas. No. 8,961; The Bennet, 1 Dod. 175.

[9] This principle was clearly and convincingly stated in the case of Brown v. Union Ins. Co., 4 Day (Conn.) 179, 4 Am. Dec. 204. Swift, J., in delivering the opinion of the court, remarked: "I apprehend our acknowledgment of the authority of the law of nations, and our adoption of the marine law, have established principles decisive of this question. The law of nations is a rule of conduct obligatory on sovereign independent states; and the right of capture on the high seas by nations at war is clearly a part of that law. The decrees of judicial tribunals proceeding according to the law of nations must be conclusive, as far as that law is recognized, for the same reason that judgments of courts proceeding according to municipal law are conclusive, as far as that law extends. In all civilized states, courts are constituted that have jurisdiction of questions of prize, and are to decide according to the law of nations. In these cases the proceedings are in rem, and every person interested is supposed to be a party to them. Whenever, then, a court of admiralty in one country, acting as a prize court, decides on the question of prize and condemns captured property, such sentence or decree must be conclusive evidence, when the same question shall arise in any other country recognizing the law of nations, on the same principle that the judgment of a municipal court is conclusive between the same parties and their representatives, whenever the same question shall arise in

partly on grounds of necessity and propriety. Thus the United States supreme court has declared that the law on this point rests on three very obvious considerations: "the propriety of leaving the cognizance of prize cases exclusively to courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in the courts of common law; and the impropriety of revising the decisions of maritime courts of other nations whose jurisdiction is co-ordinate throughout the world." [10]

But the rule thus established is not confined to adjudications in prize cases. It extends generally to all admiralty decrees proceeding from a court having jurisdiction of the res. Thus, where a French court, having competent jurisdiction, in a proceeding in rem, delivered a judgment ordering the sale of a British ship then lying in the foreign port, under a lien for supplies furnished, it was held that the sale could not afterwards be impeached in England, in an action against the vendee, even though the person seeking to impeach it would, by the law of the latter country, have a preferential title to the chattel.[11] And the same principle applies to judgments on a maritime lien for damages caused by a collision,[12] and to adjudi-

another court in the same country where the judgment was rendered. As we have adopted the law of nations, we must take it with all its consequences; and we can have no more right to deny the conclusiveness of the sentence of a foreign court of admiralty, acting as a prize court according to the law of nations, when the same question arises before us, than we have to deny the conclusiveness of a judgment of a court in this state, when the same question arises between the same parties in another court, or than we have to deny any other principle of the law of nations. I should therefore deem the decree of the court of admiralty to be conclusive in this case, not on the authority of the decisions in Great Britain, but on the authority of the law of nations, which is a part of the common law of the land. At the same time, it is not improper to observe that the courts of Westminster Hall have uniformly paid such a sacred regard to principle in their decisions that they may be deemed good evidence, not only of national law, but of common law, and are entitled to the highest respect in all countries governed by the same general rules of jurisprudence." See, also, Williams v. Jones, 13 Mees. & W. 633; Godard v. Gray, L. R. 6 Q. B. 139.

[10] Croudson v. Leonard, 4 Cranch, 434, 2 L. Ed. 670.

[11] Castrique v. Imrie, L. R. 4 H. L. 414. And see Minna Craig S. S. Co. v. Chartered Mercantile Bank [1897] 1 Q. B. 460.

[12] The East, 9 Ben. 76, Fed. Cas. No. 4,251; Harmer v. Bell, 7 Moore, P. C. 267.

cations ordering the sale of wrecks and property left derelict.[13] But it has been held that the parties in interest may avoid this conclusive effect of a foreign admiralty decree by an express stipulation to that effect made in advance. Thus, if a policy of insurance underwritten in Philadelphia contains a warranty of American property, "to be proved, if required, in this city and not elsewhere," the assured is entitled to vindicate the truth of his warranty as against a foreign condemnation of the subject-matter as enemies' property.[14]

§ 815. Conclusive of Grounds of Sentence.

It is almost universally held in this country that the sentence of a foreign court of admiralty, proceeding in rem, after acquiring jurisdiction, whereby a vessel or cargo is condemned as lawful prize, is conclusive evidence, not only to change the property in the res, but also of all the facts upon which the condemnation was founded. Thus, in a subsequent action between the owners and the underwriters, such a sentence is conclusive evidence that the goods so condemned were enemies' property (if that was the ground of condemnation), and therefore that there has been a breach of the warranty of neutrality contained in the policy.[15] So, in a similar action, the sentence of a foreign admiralty court condemning the insured vessel for a breach of blockade, and specifying that as the ground of condemnation, is conclusive evidence of the fact of such breach of blockade.[16] The same rule holds good in England. "Since the judgment of the House of Lords in Lothian v. Henderson,[17] it may now be assumed as the settled doctrine of an English court of law that all

[13] Grant v. McLachlin, 4 Johns. (N. Y.) 34.

[14] Calhoun v. Insurance Co. of Pennsylvania, 1 Bin. (Pa.) 293.

[15] Walton v. Bethune, 2 Brev. (S. C.) 453, 4 Am. Dec. 597; Brown v. Union Ins. Co., 4 Day (Conn.) 179, 4 Am. Dec. 204; Cucullu v. La. Ins. Co., 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199; Blanque v. Peytavin, 4 Mart. O. S. (La.) 458, 6 Am. Dec. 705.

[16] Croudson v. Leonard, 4 Cranch, 434, 2 L. Ed. 670; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600, Fed. Cas. No. 1,793; Peters v. Warren Ins. Co., 3 Sumn. 389, Fed. Cas. No. 11,035; Baxter v. N. E. Marine Ins. Co., 6 Mass. 277, 4 Am. Dec. 125; Dempsey v. Ins. Co. of Pennsylvania, 1 Bin. (Pa.) 299, note; Stewart v. Warner, 1 Day (Conn.) 143, 2 Am. Dec. 61; Groning v. Union Ins. Co., 1 Nott & McC. (S. C.) 537.

[17] 3 Bos. & P. 499.

sentences of foreign courts of competent jurisdiction to decide questions of prize are to be received here as conclusive evidence in actions upon policies of assurance, upon every subject immediately and properly within the jurisdiction of such foreign courts, and upon which they have professed to decide judicially." [18] New York, alone, forms an exception to this consensus of opinion. Its courts have adopted a different rule, "which must now be considered as the settled law of this state. It is, that the sentence of a foreign court of admiralty, condemning the property as a good and lawful prize, according to the law of nations, is conclusive to change the property, but is only prima facie evidence of the facts on which the condemnation purports to have been founded; and in a collateral action, such evidence may be rebutted by showing that no such facts did in reality exist." [19] It is also held that a sentence of condemnation by a foreign court of admiralty, which appears on the face of the proceedings to have been founded on facts which did not warrant the judgment, will not be conclusive of the legality of the condemnation as between the insured and the underwriters of the vessel.[20]

§ 816. Grounds of Condemnation must Clearly Appear.

The rule just stated is subject to this qualification, that the sentence is conclusive in a collateral action of the grounds on which it proceeded only when those facts are clearly stated in the decree itself. If the ground of a judgment of condemnation does not appear on the face of it, it may be shown by other evidence; but if the sentence is ambiguous it will not be conclusive.[21] As stated by Chief Justice Tindal, "in order to conclude the parties from contesting the ground of condemnation in an English court of law, such ground must appear clearly upon the face of the sentence; it must not be

[18] Bolton v. Gladstone, 5 East, 155. See, also, Baring v. Clagett, 3 Bos & P. 201; Fernandez v. Da Costa, Park, Ins. 170.

[19] Ocean Ins. Co. v. Francis, 2 Wend. 64, 19 Am. Dec. 549; Vandenheuvel v. United Ins. Co., 2 Johns. Cas. 450, 1 Am. Dec. 180; Francis v. Ocean Ins. Co., 6 Cow. 404; New York Firemen Ins. Co. v. De Wolf, 2 Cow. 56; Radcliff v. United Ins. Co., 9 Johns. 277. See, also, Bourke v. Granberry, Gilmer (Va.) 16, 9 Am. Dec. 589.

[20] Williamson v. Tunno, 1 Brev. (S. C.) 151, 2 Am. Dec. 654.

[21] Marsh. Ins. 394; Bernardi v. Motteux, 2 Doug. 575.

collected by inference only, or left in uncertainty, whether the ship was condemned upon one ground which would be a just ground of condemnation by the law of nations, or on another ground which would amount only to a breach of the municipal regulations of the condemning country."[22] Thus, when it is impossible to fix by the record of the foreign court whether a prize was found to be French or American, evidence may be received to establish American ownership.[23] And so where a vessel and cargo were condemned for a rescue from the possession of a belligerent captor "or otherwise," the assured were permitted to give evidence disproving the alleged rescue.[24] But on the other hand, if a decree professes to condemn the property for a specified cause, such as breach of blockade "and for other sufficient causes," it will be conclusive of the existence of the ground specified.[25] An early American case held that if a decree of a foreign court of admiralty condemned a ship or cargo without assigning any reasons, the law of nations would presume they had gone upon just and proper grounds.[26]

§ 817. Not Conclusive of Collateral or Incidental Matters.

It is further to be observed that a foreign sentence in admiralty is conclusive only upon matters essential to the decree, and not as to matters which are merely incidental or collateral or not necessarily involved in the adjudication.[27] Upon this point a learned writer

[22] Dalgleish v. Hodgson, 7 Bing. 495; Fisher v. Ogle, 1 Camp. N. P. 417; Calvert v. Bovill, 7 Term R. 523; Hobbs v. Heming, 17 C. B. (N. S.) 791.

[23] Vasse v. Ball, 2 Dall. 270, 1 L. Ed. 377. See, also, Fitzsimmons v. Newport Ins. Co., 4 Cranch, 185, 2 L. Ed. 591.

[24] Robinson v. Jones, 8 Mass. 536, 5 Am. Dec. 114. "Where it does not appear by the decree itself on what particular ground the condemnation was had, the case is to be open to evidence as to all the points which it may be necessary for the parties in interest here to establish, except the fact of condemnation." Id.

[25] Baxter v. N. E. Marine Ins. Co., 6 Mass. 277, 4 Am. Dec. 125.

[26] Campbell v. Williamson, 2 Bay (S. C.) 237.

[27] Christie v. Secretan, 8 Term R. 192; Bernardi v. Motteux, 2 Doug. 574; Calvert v. Bovill, 7 Term R. 523; Russel v. Union Ins. Co., 4 Dall. 421, Fed. Cas. No. 12,146, 1 L. Ed. 892; Maley v. Shattuck, 3 Cranch, 458, 2 L. Ed. 498; Lambert v. Smith, 1 Cranch (C. C.) 361, Fed. Cas. No. 8,028; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600, Fed. Cas. No. 1,793; Fitzsimmons v. Newport Ins. Co., 4 Cranch, 185, 2 L. Ed. 591.

remarks: "Though the sentence of a foreign court of admiralty possesses such great authority in our courts that it is constantly received as conclusive evidence, as to the points which it professes to decide, yet it must be observed that its authority is confined to those points alone, and nothing but the matters expressly decided can be taken as incontrovertible. A fact, therefore, recited in such sentence, though it be a part of the premises on which the adjudication is founded, is not considered as adjudged, and therefore not conclusive." [28] And to much the same effect is a decision of Lord Ellenborough, to the point that such a sentence is evidence only of what it positively and specifically affirms in the adjudicative part of it, not of what may be gathered from it by way of inference.[29] A sentence of condemnation of a vessel as "enemy property," for example, is not necessarily conclusive of its nationality. For it is entirely consistent with such a sentence that the vessel might be in fact the property of a neutral, although, for some breach of the duties of a neutral, it should become liable to seizure as a prize.[30]

§ 818. Impeachable for Want of Jurisdiction.

In order that a foreign judgment in rem should be binding and conclusive, it is necessary that it should have been rendered by a lawfully constituted court, having jurisdiction of the cause, of the res, and of the parties (so far as the latter species of jurisdiction is essential to proceedings of this character), and these elements of its authority may always be inquired into when the sentence comes collaterally in question.[31] For instance, the court of the sovereign of the captor is the only competent tribunal to decide on the validity of captures. Prize courts cannot adjudicate on a prize lying in a foreign port or out of the jurisdiction of the captor or his ally. And if they proceed to pass upon such a question when the subject-matter of their sentence is within the territory of a neutral power, such sentence is void, transfers no rights, and may be disregarded by the

[28] 1 Marsh. Ins. 411.
[29] Fisher v. Ogle, 1 Camp. 418.
[30] Maley v. Shattuck, 3 Cranch, 458, 2 L. Ed. 498.
[31] Rose v. Himely, 4 Cranch, 241, 2 L. Ed. 608; Cherlot v. Foussat, 3 Bin. (Pa.) 220; Story, Confl. Laws, § 586.

common law courts.[32] Further, "it must appear that there have been regular proceedings to found the judgment or decree, and that the parties in interest in rem have had notice or an opportunity to appear and defend their interests, either personally or by their proper representatives, before it was pronounced; for the common justice of all nations requires that no condemnation shall be pronounced before the party has an opportunity to be heard."[33] In one of the

[32] Wheelwright v. Depeyster, 1 Johns. (N. Y.) 471, 3 Am. Dec. 345. See, also, The Flad Oyen, 8 Term. R. 270.

[33] Story, Confl. Laws, § 592; Sawyer v. Maine Fire & Marine Ins. Co., 12 Mass. 291; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 180; Magoun v. N. E. Marine Ins. Co., 1 Story, 157, Fed. Cas. No. 8,961; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600, Fed. Cas. No. 1,793. In the case last cited, Story, J., delivered his opinion upon this point in the following forcible and convincing terms: "There is another element which, it seems to me, constitutes an essential ingredient in every case where the sentence of a foreign court in rem is sought to be held conclusive, as to the title to the property and as to the facts upon which it professes to be founded. That element is, that there have been proper judicial proceedings upon which to found the decree; by which I mean, not that there should be regular proceedings according to the forms of our law, or even of the foreign law, but that there should be some certain written allegation of the offense, or statement of the charge, for which the seizure is made, and upon which the forfeiture is sought to be enforced; and that there should be some personal or public notice of the proceedings, so that the parties in interest, or their representatives or agents, may know what is the offense with which they are charged, and may have an opportunity to defend themselves and to disprove the charge. It is a rule founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defense before his property is condemned, and that the charges on which the condemnation is sought shall be specific, determinate, and clear. If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offense, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defense, the sentence is not so much a judicial sentence as an arbitrary sovereign edict. It has none of the elements of a judicial proceeding, and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or its truth, by any foreign tribunal. It amounts to little more, in common sense and common honesty, than the sentence of the tribunal which first punishes and then hears the party—castigatque, auditque. It may be binding upon the subjects of that particular nation. But upon the eternal principles of justice it ought to have no binding obligation upon the rights or property of the subjects of other nations, for it tramples under foot all the doctrines of international law, and is but a solemn fraud, if it is clothed with all the forms of a judicial proceeding. I hold, therefore,

early cases in this country, the question was upon the effect of a decree of a court of admiralty in the island of Hayti, condemning a vessel and cargo belonging to American citizens for an alleged breach of blockade. It did not appear that any libel was filed, any monition issued, or any trial or hearing had. It was held that the decree was not conclusive of the fact charged.[34]

§ 819. Not Impeachable for Error.

As respects the conclusiveness of a foreign judgment in rem, it is no ground of objection to it that it is erroneous, even though the error appears on the face of the proceedings. The sentence cannot, for that reason, be impeached in any collateral action. In an important English case it was observed by Lord Colonsay: "It appears to me that we cannot enter into an inquiry as to whether the French courts proceeded correctly either as to their own course of procedure or their own law, nor whether, under the circumstances, they took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were right in their views of the English law. The question is whether, under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship."[35]

that if it does not appear upon the face of the record of the proceedings in rem that some specific offense is charged for which the forfeiture in rem is sought, and that due notice of the proceedings has been given, either personally or by some public proclamation, or by some notification or monition, acting in rem and attaching to the thing, so that the parties in interest may appear and make defense, and in point of fact the sentence of condemnation has passed upon ex parte statements without their appearance, it is not a judicial sentence, conclusive upon the rights of foreigners, or to be treated in the tribunals of foreign nations as importing verity in its statements or proofs."

[34] Sawyer v. Maine Fire & Marine Ins. Co., 12 Mass. 291.

[35] Castrique v. Imrie, L. R. 4 H. L. 414. And see Imrie v. Castrique, 8 C. B. (N. S.) 405; Castrique v. Behrens, 30 L. J. Q. B. 163; Williams v. Armroyd, 7 Cranch, 423, 3 L. Ed. 392.

§ 820. Whether Fraud may be Shown.

Whether a foreign judgment in rem may be impeached on the ground of fraud practised in obtaining it, is a question which has not very frequently arisen, and one upon which the authorities are divided. In an early American decision it was said: "The question in this case is whether a sentence of condemnation of a foreign court of competent jurisdiction can be avoided on the ground of fraud practised in obtaining it, when thus called in question collaterally in this country; and the court are of opinion that such sentence cannot thus be called in question, but must remain in full force until avoided in some regular mode in the country where it was passed."[36] But on the other hand, the late English cases seem to favor the view that if the judgment was fraudulent it may be overthrown on that ground.[37] And most of the text-writers appear to be of the same opinion.[38] We shall have more to say on this subject in connection with the grounds for impeaching foreign judgments in personam.[39]

§ 821. Objections to Legality of Court.

In passing upon the effect to be given to a foreign judgment in rem, it is always competent to inquire whether the foreign court had lawful authority to act as such, and was a duly organized and constituted tribunal. If such was not the case, its sentences have no force or validity.[40] Thus the sentence of a court of a belligerent power set up within the territory of a neutral state is entitled to no authority, since it acts under an usurped and illegal power and one contrary to the law of nations. But if the court sits within the

[36] Stewart v. Warner, 1 Day, 142, 2 Am. Dec. 61.

[37] Shand v. Du Boisson, L. R. 18 Eq. 283; Messina v. Petrocochino, L. R. 4 P. C. 144. And see a dictum to the same effect in Godard v. Gray, L. R. 6 Q. B. 139.

[38] Story, Confl. Laws, §§ 592, 597; 1 Whart. Ev. § 814; Bigelow, Estop. (3d Ed.) 195; Freem. Judgm. § 591.

[39] See infra, § 844.

[40] Cucullu v. La. Ins. Co., 5 Mart. N. S. (La.) 464, 16 Am. Dec. 199; Snell v. Faussatt, 1 Wash. C. C. 271, Fed. Cas. No. 13,138; The Griefswald, Swab. 430; The Flad Oyen, 1 C. Rob. Adm. 135.

domains of an allied nation, its jurisdiction is rightful and its constitution legal.[41] The presumption, however, is in favor of the legitimacy of the foreign tribunal, at least when the authority under which it assumes to act is not made known and there are no circumstances to arouse suspicion. But it is said that if the source of the court's authority and the manner of its constitution are stated, it is proper to scrutinize them, and if the circumstances are unusual or apparently illegal, it devolves upon the party who would support the decree to vindicate the rightfulness of the court's existence and authority.[42] But a foreign court acting under the authority of those in whom the power of the country is for the time being vested must be deemed to have the jurisdiction of a legitimate court. It is sufficient that it is a court de facto.[43]

§ 822. Foreign Decrees of Divorce.

In England, the law respecting foreign judgments of divorce, or sentences on the validity of a marriage, has undergone considerable fluctuation. Lord Hardwicke once ruled that the sentence of a foreign court affirming the validity of a marriage was conclusive, if rendered by a court having jurisdiction and without fraud.[44] But the general disposition of the English courts has always been to deny that any valid sentence of divorce could be pronounced in any foreign country which should amount to a dissolution of a marriage celebrated in England between English subjects, at least so far as such a divorce is to have any force or operation in England.[45] Still, this doctrine has been elaborately discussed in several recent cases, and the grounds upon which it rests have been much shaken.[46]

[41] 1 Marsh. Ins. 388.

[42] Snell v. Faussatt, 1 Wash. C. C. 271, Fed. Cas. No. 13,138.

[43] Bank of North America v. McCall, 4 Bin. (Pa.) 371.

[44] Roach v. Garvan, 1 Ves. Sr. 157.

[45] Rex v. Lolley, 2 Russ. & R. 237; Sinclair v. Sinclair, 1 Hagg. Consist. 294; Scrimshire v. Scrimshire, 2 Hagg. Consist. 395; Connelly v. Connelly, 2 Eng. Law & Eq. 570; Shaw v. Attorney-General, L. R. 2 Prob. Div. 161; Deck v. Deck, 2 Swab. & T. 90. See Story, Confl. Laws, §§ 215–230, 579, where the whole subject is learnedly discussed.

[46] Dolphin v. Robins, 7 H. L. Cas. 390; Warrender v. Warrender, 2 Clark & F. 541; Harvey v. Farnie, 8 App. Cas. 43.

The rule, as it now stands, appears to have been stated with exactness in the recent case of Shaw v. Gould,[47] where it was held that a foreign tribunal has no authority, so far as any consequences in England are concerned, to pronounce a decree of divorce a vinculo in the case of an English marriage between English subjects, unless the parties are, at the time of such decree pronounced, bona fide domiciled in the country where that tribunal has jurisdiction, and the suit is prosecuted without collusion. The English courts do not admit that the domicile of one party within the territory is sufficient to give jurisdiction.[48] In America it is generally held, and indeed almost universally, that as a proceeding in divorce is intended to affect the status of the parties, and is therefore essentially in rem, the judgment pronounced, whether in a foreign country or in a sister state, by a court having lawful jurisdiction of the cause, and in the absence of fraud, is valid and binding everywhere and in all subsequent controversies, provided the applicant was bona fide domiciled within the territorial jurisdiction of the court, although the other party, being a non-resident, was notified only by advertisement or some other species of constructive service.[49]

§ 823. Foreign Probate Decrees.

The adjudications of foreign courts in matters of probate jurisdiction, such as the proof of wills and the grant of administration or letters testamentary, are also recognized as being of ubiquitous authority and universally conclusive.[50] In a recent English case it appeared that, in a foreign court, upon the death of a person domiciled

[47] L. R. 3 H. L. 55.

[48] Le Suer v. Le Suer, L. R. 1 Prob. Div. 139.

[49] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Roth v. Roth, 104 Ill. 35, 44 Am. Rep. 81; Ditson v. Ditson, 4 R. I. 87; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 743; Burlen v. Shannon, 115 Mass. 438; Hood v. Hood, 110 Mass. 463; Wright v. Wright, 24 Mich. 180; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549; Rush v. Rush, 46 Iowa, 648, 26 Am. Rep. 179; James v. James, 81 Tex. 373, 16 S. W. 1087; McGrew v. Mutual Life Ins. Co., 132 Cal. 85, 64 Pac. 103, 84 Am. St. Rep. 20; 2 Bish. Mar. & Div. §§ 155-164. See infra, §§ 924-933.

[50] Williams v. Saunders, 5 Cold. (Tenn.) 60; Tompkins v. Tompkins, 1 Story, 547, Fed. Cas. No. 14,091.

in the country where that court had jurisdiction, C. claimed to be the natural son of the decedent, and as such natural son to be entitled by the law of that country to inherit his father's property, and alleged that his father was of a particular station in society (which circumstance allowed of such a claim by his natural son), and that the father had died domiciled in the country, and had died intestate, and the foreign court found all these allegations in his favor. It was held that the probate court in England was bound by the judgment of the foreign court, and had therefore rightly admitted C. to be heard as contradictor to a will, set up in the latter country as having been made by the decedent disposing of his personal property there.[51]

§ 824. Foreign Adjudications in Bankruptcy.

According to the general doctrines of international law, the discharge of a contract by the law of the place where it is made is a discharge everywhere. Therefore if a contract is made and to be performed in a foreign country, and a regular discharge in bankruptcy has been obtained by the debtor resident there, the discharge will constitute a valid defense to the contract, wherever the creditor may be domiciled, or wherever the contract may be put in suit.[52] But in respect to contracts not made or to be performed within the country granting the discharge, it could of course have no extraterritorial validity, as against non-resident creditors, unless they came in and took part in the proceedings. And in a case in Pennsylvania, where the question was upon a judgment rendered by a Bavarian court in a proceeding in bankruptcy, allowing the claim of the plaintiffs against the bankrupt, but the latter being out of the country, the court never acquired jurisdiction of his person, it was held that an action of debt would not lie on the judgment.[53] But a foreign discharge in bankruptcy is prima facie evidence that all the proper

[51] Doglioni v. Crispin, L. R. 1 H. L. 301.

[52] Potter v. Brown, 5 East, 124; Blanchard v. Russell, 13 Mass. 1, 7 Am. Dec. 106; Smith v. Smith, 2 Johns. (N. Y.) 235, 3 Am. Dec. 410; Ory v. Winter, 4 Mart. (N. S.; La.) 277; Sherrill v. Hopkins, 1 Cow. (N. Y.) 103; Peck v. Hibbard, 26 Vt. 702, 62 Am. Dec. 605; Marsh v. Putnam, 3 Gray (Mass.) 551; Story, Confl. Laws, § 340.

[53] Kuehling v. Leberman, 2 Wkly. Notes Cas. 616.

steps were taken to obtain the discharge, and the party pleading it is not required to prove such facts in the first instance.[54]

PART II. FOREIGN JUDGMENTS IN PERSONAM.

§ 825. Conclusiveness on the Merits. Early English Cases.

In respect to the conclusiveness of foreign judgments in personam, the earlier cases in the English reports exhibit a decided hesitation in approaching the question and a great diversity of opinion as to its proper answer. On the one hand, we have an expression of opinion from Lord Nottingham, as far back as the time of Charles II, to the effect that a foreign sentence of divorce ought to be held conclusive. "It is against the law of nations," said he, "not to give credit to the sentences of foreign countries, till they are reversed by the law, and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be reversed? And what confusion would follow in Christendom if they should serve us so abroad, and give no credit to our sentences."[55] So there is a dictum of Lord Hardwicke that "when any court, whether foreign or domestic, that has the proper jurisdiction of the case, makes a determination, it is conclusive to all other courts."[56] And the same view was held, with more or less assurance, in certain other early cases.[57] On the other hand, a contrary opinion was entertained by Lord Mansfield, Chief Baron Eyre, and Justice Buller, and has been expressed in some later cases, viz., that while a foreign judgment in a personal suit was sufficient to give a ground of action, and amounted to prima facie evidence of debt, yet it was not conclusive, and the case might be re-examined on the merits.[58] In a case ruled in 1826, Best, C. J., quoted with apparent approval the statement in Sinclair v. Fraser, 20 How. St. Trials,

[54] Ohlemacher v. Brown, 44 U. C. Q. B. 366.

[55] Kennedy v. Cassillis, 2 Swanst. 326, note.

[56] Boucher v. Lawson, Cas. t. Hardw. 89.

[57] Hamilton v. Dutch East India Co., 8 Brown, Parl. Cas. 264.

[58] Walker v. Witter, 1 Doug. 1, 6; Herbert v. Cook, Willes, 36, note; Hall v. Odber, 11 East, 118; Bayley v. Edwards, 3 Swanst. 703; Phillips v. Hunter, 2 H. Bl. 410; Galbraith v. Neville, cited 1 Doug. 6, note 3; Sinclair

469, that "foreign judgments are prima facie evidence of a debt, although it is competent to the defendant to impeach the justice of them, or to show that they are irregularly or unduly obtained." [59]

§ 826. Distinction between Foreign Judgment as a Cause of Action and as a Defense.

The progress of the English courts towards a satisfactory solution of the question of the conclusiveness of foreign judgments, was for a considerable period impeded by a suggestion which had been made, as to the difference between using such a judgment as a cause of action and presenting it as a plea in bar. Chief Justice Eyre had said: "It is in one way only that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent to which by our law sentences and judgments are obligatory, not as conclusive, but as matter in pais, as consideration prima facie sufficient to raise a promise; we examine it as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us." [60] And this distinction was adopted and applied in numerous other cases before the English tribunals.[61] It also found its way to this country, and we may cite some of the earlier rulings of our own courts to the proposition that a foreign judgment, when sought to be enforced by a suit brought upon it, is only prima facie evidence and may be impeached for ir-

v. Fraser, 20 How. St. Trials, 469; Houlditch v. Donegal, 8 Bligh (N. R.) 301; Don v. Lippmann, 5 Clark & F. 1.

[59] Arnott v. Redfern, 3 Bing. 353.

[60] Phillips v. Hunter, 2 H. Bl. 402, 410.

[61] Burrows v. Jemino, 2 Strange, 733; Boucher v. Lawson, Cas. t. Hardw. 85; Tarleton v. Tarleton, 4 Maule & S. 20; Woodburne v. Plummer, 1 Barn. & C. 625; Reimers v. Druce, 23 Beav. 145. And see Story, Confl. Laws, § 598; 2 Kent, Comm. 119, 120.

regularity and rebutted by evidence, whereas, used as a defense, it is as conclusive to every intent as a domestic judgment.[62] A precisely similar distinction may be found established in the Scotch law.[63] And thus it is, or was at one time, well supported by authority. But the doctrine is sustained neither by principle nor by the best modern decisions. For if carried to its legitimate conclusions, it would produce consequences which the courts have distinctly refused to recognize. If one who has successfully defended a suit brought against him in a foreign court may set up the judgment as a conclusive bar to an action against him here, it ought to be equally true that he could rely implicitly upon a judgment against him in the foreign court. In other words, the foreign judgment should be held to merge the original cause of action. But then, if the cause of action is merged in the foreign judgment, it is clearly necessary to hold that judgment final and conclusive when made the basis of a suit. But the courts, as we shall presently see, do not as yet hold that the cause of action is merged in the foreign judgment. There is an inconsistency here which tells equally in both directions. But it is sufficient for our present purpose to point out that it effectually destroys the reasonableness of the distinction taken by Chief Justice Eyre. So stands the case upon principle. As a matter of precedent, the doctrine has been gradually abandoned. Forty years ago Romilly, M. R., observed that "this distinction has certainly not been carried out to the extent laid down by Lord Chief Justice Eyre."[64] And since that time it has been altogether repudiated. For the settled rule in England, at the present day, and the strong tendency of the modern American cases, is to regard foreign judgments as equally conclusive and binding whether they are used as a cause of action or presented as a defense. This will more fully appear in the following sections.

[62] Taylor v. Phelps, 1 Har. & G. (Md.) 492 (1827); Griswold v. Pitcairn, 2 Conn. 85 (1816); Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; Buttrick v. Allen, 8 Mass. 273, 5 Am. Dec. 105. On the subject of foreign judgments as a cause of action, see Lilienthal v. Druckleb (C. C.) 80 Fed. 562; Tourigny v. Houle, 88 Me. 406, 34 Atl. 158.

[63] Ersk. Inst. bk. 4, tit. 3, § 4.

[64] Reimers v. Druce, 23 Beav. 145.

§ 827. Later English Decisions.

Notwithstanding the fluctuations of opinion manifested in the earlier cases which we have cited, the English courts have finally determined upon the conclusiveness of foreign judgments in personam. And it must now be regarded as irrevocably settled, as a rule of English law, that such judgments when rendered by a court having jurisdiction of the subject-matter and the parties, and without fraud, and while still remaining in full force abroad, are binding and conclusive in the English courts, in all cases, and not open to impeachment or re-examination on the merits.[65] In one of the latest and most important cases on this subject, it is said that a foreign judgment is examinable and is only prima facie evidence of the debt, so far as to show that the foreign court had no jurisdiction of the subject-matter of the suit, or that the defendant was never served with process, or that the judgment was fraudulently obtained; but it is conclusive upon the defendant so far as to prevent him from alleging that the promises upon which it is founded were never made or were obtained by the fraud of the plaintiff; and any pleas which might have been pleaded to the original action cannot be pleaded to the action on the judgment.[66] This decision finally establishes the conclusiveness of such a judgment when used as a cause of action. And as respects its effectiveness as a defense, we have an equally positive ruling of the House of Lords, made in a case where the defendant pleaded in bar that the plaintiff had before brought his action against him in a French court upon the identical cause of action now presented, whereupon judgment had passed in the de-

[65] Bank of Australasia v. Nias, 16 Q. B. 717; Bank of Australasia v. Harding, 9 C. B. 661; Ferguson v. Mahon, 11 Adol. & E. 179; Guinness v. Carroll, 1 Barn. & Adol. 459; Patrick v. Shedden, 2 El. & Bl. 14; Scott v. Pilkington, 2 Best & S. 11; Paul v. Roy, 15 Beav. 433; Arnott v. Redfern, 3 Bing. 353; Doglioni v. Crispin, L. R. 1 H. L. 301; Godard v. Gray, L. R. 6 Q. B. 139; Ricardo v. Garcias, 12 Clark & F. 368; Castrique v. Imrie, L. R. 4 H. L. 414; General Steam Nav. Co. v. Gouillou, 11 Mees & W. 877; Simpson v. Fogo, 1 Johns. & H. 18; De Cosse Brissac v. Rathbone, 6 Hurl. & N. 301; Tarleton v. Tarleton, 4 Mees. & S. 20; Martin v. Nicolls, 3 Sim. 458; Vanquelin v. Bouard, 15 C. B. (N. S.) 341; Messina v. Petrocochino, L. R. 4 P. C. 144; Pemberton v. Hughes [1899] 1 Ch. 781, 68 Law J. Ch. 281.

[66] Bank of Australasia v. Nias, 16 Q. B. 717.

fendant's favor. It appearing that the former suit was tried upon the merits and that the same matters were involved, it was held that the action was barred.[67]

§ 828. Early American Decisions.

In this country in almost all the earlier cases in which the effect and conclusiveness of foreign judgments became a question, rulings were made to the effect that such judgments were only prima facie evidence of debt and that they were not conclusive on the merits.[68] It will be observed, however, that all these decisions rest upon the earlier English cases holding the same doctrine. The latter have now been overruled or repudiated, as we have just pointed out, but not until after the theory of the inconclusiveness of such judgments had come to be generally recognized by the American judges. Had the same cases been decided in the light of the recent English adjudications, the result would undoubtedly have been different, for the courts professed to be guided by the views obtaining in Westminster Hall. An idea of the manner in which foreign judgments were regarded, at that day, and the considerations which were deemed influential in determining their effect, can be gathered from the following remarks of Judge Woodbury, in a case where a decree from New Brunswick was concerned: "My own impressions in relation to foreign judgments are these: They do, like domestic ones, operate conclusively ex proprio vigore within the governments in which they are rendered, but not elsewhere. When offered and considered elsewhere, they are, ex comitate, treated with respect, according to the

[67] Ricardo v. Garcias, 12 Clark & F. 368.

[68] Green v. Sarmiento, Pet. C. C. 74, Fed. Cas. No. 5,760; Burnham v Webster, 1 Woodb. & M. 172, Fed. Cas. No. 2,179; Boston India Rubber Factory v. Holt, 14 Vt. 92; Bartlet v. Knight, 1 Mass. 401, 2 Am. Dec. 36; Bissell v Briggs, 9 Mass. 462, 6 Am. Dec. 88; Buttrick v. Allen, 8 Mass. 273, 5 Am. Dec. 105; Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Pawling v Willson, 13 Johns. (N. Y.) 192; Hitchcock v. Aicken, 1 Caines (N. Y.) 460; Smith v. Lewis, 3 Johns. (N. Y.) 157. 3 Am. Dec. 469; Borden v. Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Benton v. Burgot. 10 Serg. & R. (Pa.) 240; Pritchett v. Clark, 3 Har. (Del.) 517; Taylor v. Phelps, 1 Har. & G. (Md.) 492; Barney v. Patterson's Lessee, 6 Har. & J. (Md.) 182; Garland v. Tucker, 1 Bibb (Ky.) 361; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; Bimeler v. Dawson, 4 Scam. (Ill.) 536, 39 Am. Dec. 430.

nature of the judgment and the character of the tribunal which rendered it, and the reciprocal mode, if any, in which that government treats our judgments, and according to the party offering it, whether having sought or assented to it voluntarily or not, so as to give it in some degree the force of a contract, and hence to be respected elsewhere by analogy according to the lex loci contractus. With these views, I would go to the whole extent of the cases decided by Lord Mansfield and Buller; and where the foreign judgment is not in rem, as it is in admiralty, having the subject-matter before the court and acting on that rather than the parties, I would consider it only prima facie evidence as between the parties to it."[69] But at the same time it is to be remembered, as was observed by the learned Story, speaking with special reference to the English cases, but in terms equally applicable to the American cases, that "it is admitted on all sides that in such cases [suits to enforce foreign judgments] the foreign judgments are prima facie evidence to sustain the action, and are to be deemed right until the contrary is established."[70] And further, in several of these earlier decisions in our own courts it is very clearly intimated that if the foreign judgment is only incidentally involved in the controversy it will have the same degree of conclusiveness which attaches to domestic judgments.[71] And in this proposition, it is said in another case, all the American authorities are agreed.[72]

§ 829. Recent American Decisions.

Among the more recent American cases there are a few which still adhere to the old doctrine that foreign judgments are only prima facie evidence of debt and not conclusive.[73] But of the four cases cited it must be remarked that the first two, in so far as they touch this question, express an opinion which can only be regarded as

[69] Burnham v. Webster, 1 Woodb. & M. 172, Fed. Cas. No. 2,179.

[70] Story, Confl. Laws, § 603.

[71] Taylor v. Phelps, 1 Har. & G. (Md.) 492; Barney v. Patterson's Lessee, 6 Har. & J (Md.) 182.

[72] Cummings v. Banks, 2 Barb. (N. Y.) 602.

[73] President, etc., of Middlesex Bank v. Butman, 29 Me. 19; Taylor v. Barron, 30 N. H. 79, 64 Am. Dec. 281; Burnham v Webster, 1 Woodb. & M. 172, Fed. Cas. No. 2,179; Rankin v. Goddard, 54 Me. 28, 89 Am. Dec. 718.

obiter dictum, the real point at issue being the effect of a judgment rendered in a sister state, not a strictly foreign judgment. And as to the third, it was expressly rested upon the earlier English rulings, which, as we have seen, have since been overruled or abandoned and are no longer of any authority. The remaining case, Rankin v. Goddard, is commonly cited as a direct adjudication against the conclusiveness of foreign judgments, but a careful examination of the opinion will show that it does not in reality go to that length. For although it was stated to be the general doctrine of the American courts that such judgments were prima facie evidence but that they might be impeached, yet the court added, "the authorities here go to this extent, that the jurisdiction of the court and its power over the parties and the matters in controversy may be inquired into, and that the judgment may be impeached for fraud," neither of which objections, conceding them to be available, would be inconsistent with the conclusiveness of the judgment on the merits in a case where jurisdiction was present and fraud absent.

But the modern tendency of the decisions, in this country, is plainly and uniformly in the direction of holding foreign judgments in personam, rendered by courts having jurisdiction, to be binding and conclusive upon the parties and not re-examinable upon the merits.[74] In the state of New York, in more recent times, this opinion was at first advanced with some hesitation and with a disposition to go no further than was necessary in the particular case. Thus it was said: "The principle on which the rule is founded, namely, that the point has already been decided between the parties or their privies, by a court of competent jurisdiction, and that future litigation would be useless and vexatious, is just as applicable to foreign as to domestic judgments. But I do not know that it is necessary, in this case, to go the length of holding a foreign judgment to be conclusive, though, if it were, I should be inclined to hold that as the better

[74] Lazier v. Westcott, 26 N. Y. 146, 82 Am. Dec. 404; McEwan v. Zimmer, 38 Mich. 765, 31 Am. Rep. 332; Cincinnati, U. & Ft. W. R. Co. v. Wynne, 14 Ind. 385; Cummings v. Banks, 2 Barb. (N. Y.) 602; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126; Baker v. Palmer, 83 Ill. 568; Hilton v. Guyott (C. C.) 42 Fed. 249; Christian & Craft Grocery Co. v. Coleman, 125 Ala. 158, 27 South. 786. But compare Tourigny v. Houle, 88 Me. 406, 34 Atl. 158.

opinion in this country as well as in England."[75] But some years later, in the case of Lazier v. Westcott,[76] the question arose squarely, in an action upon a judgment recovered in a Canadian court. It was said: "We think the rule adopted in England, holding the same doctrines as to foreign judgments and recognized in this state, should be adopted and adhered to here in respect to such foreign judgments, and that the same principles and decisions which we have made, as to judgments from the courts of other states of the Union, should be applied to foreign judgments." It was accordingly held that a judgment of a court of a foreign country duly proven, is conclusive between the parties, where there has been a trial upon the merits, and there has been no fraud or want of jurisdiction, and no mistake is shown or offered to be shown.[77] This decision has settled the law, at least for the courts of that state, and has been several times approved and followed. For instance, Harrison v. Lourie[78] was an action on a judgment recovered in the English court of Queen's Bench. The opinion contains the following language: "The court in which the trial was had and judgment entered having acquired jurisdiction of the person of the defendant, its adjudication upon the issues formed by the pleadings is conclusive in an action upon the judgment in the courts of this country, and the defendant is precluded from inquiring into, questioning, or defending upon the merits."[79] And a more recent decision in the same state holds that an indemnitor is bound by the judgment in a suit against the person to whom he is liable, in respect to the subject-matter of the guaranty, if he had notice of the action, and that a judgment rendered in Germany has the same effect in this respect as one pronounced by our own courts.[80]

[75] Cummings v. Banks, 2 Barb. 602.

[76] 26 N. Y. 146, 82 Am. Dec. 404.

[77] The court cited and relied upon Henderson v. Henderson, 6 Q. B. 288; Ferguson v. Mahon, 11 Adol. & E. 179; Ricardo v. Garcias, 12 Clark & F. 368; Bank of Australasia v. Nias, 16 Q. B. 717; and also Taylor v. Bryden, 8 Johns. (N. Y.) 173; Monroe v. Douglas, 4 Sandf. Ch. (N. Y.) 126; Story, Confl. Laws, § 607; and disapproved King v. Van Gilder, 1 D. Chip. (Vt.) 59.

[78] 49 How. Prac. 124 (N. Y. Super. Ct.; 1875).

[79] To the same effect, Shepard v. Wright, 59 How. Prac. (N. Y.) 512.

[80] Konitzky v. Meyer, 49 N. Y. 571. And see Dunstan v. Higgins, 138 N.

Nor have the courts of other states, in which the same question has arisen, refused to follow the general current of authorities. In Louisiana, it is held not only that a foreign judgment is final and conclusive upon the merits, but even that it operates as a merger of the original claim, so that no new suit can be maintained in that state upon the claim or demand sued on abroad, but only upon the judgment recovered [81]—a position which, as we shall presently see, is far in advance of that yet reached by the majority of our courts. In a late case in Arkansas, the court observed, with reference to the once prevalent rule, that "when the English courts began to doubt its soundness, the current of American authority began to change, and since the English dicta were repudiated at home, their doctrine has been but little regarded here. . . . . A judgment, whether foreign or domestic, raises a binding obligation to pay the sum awarded by it, and the presumption as to its conclusiveness should follow the law of the forum in which the proceedings were had. . . . . It is not the policy of the law to encourage litigation, and where a court of competent jurisdiction, having the parties legally before it, has adjudicated the merits of their case, every reason favors holding them bound by the adjudication, wherever the judgment may be called in question, if there has been no fraud practised in obtaining it. This is now the accepted rule." [82]

The supreme court of the United States, in recent decisions, has laid down the following principles as applicable to actions on foreign judgments: Where an action is brought in an American court by an alien against a citizen, on a judgment recovered by the former against the latter in a foreign country, and it appears that the foreign court had jurisdiction of the cause and of the parties, the judgment is at least prima facie evidence of the truth of the matter adjudged, and it should be held conclusive on the merits, unless some special ground is shown for impeaching it. If there was opportunity for a fair trial before the foreign court, having

Y. 70, 33 N. E. 729, 20 L. R. A. 668, 34 Am. St. Rep. 431, affirming s. c. 63 Hun, 631, 28 Abb. N. C. 33, 17 N. Y. Supp. 887. Compare In re Gaines' Will, 84 Hun, 520, 32 N. Y. Supp. 398.

[81] Jones v. Jamison, 15 La. Ann. 35.

[82] Glass v. Blackwell, 48 Ark. 50, 2 S. W. 257.

jurisdiction as aforesaid, and the proceeding was conducted under a system of jurisprudence likely to secure an impartial administration of justice as between natives and foreigners, and if there is no special reason why the comity of the United States should not allow full effect to the judgment, the merits of the case should not be opened and tried afresh, in an action brought in this country on the foreign judgment, on the mere assertion that the judgment was erroneous in law or in fact. Nor can the foreign judgment be disregarded merely because the rules of evidence or of procedure in the country where it was rendered are more lax than ours, or do not accord with those principles which the American system of jurisprudence regards as essential to secure a just and impartial administration of justice. Thus, such a judgment cannot be impeached because the plaintiff was permitted to testify without being sworn, and was not subjected to cross-examination, nor because documents were admitted in evidence with which the defendant had no connection, and which would not be admissible in the United States, provided that the practice followed and the method of examining witnesses were according to the law of the forum. But it was also held in the case in which these rulings were made (although by a bare majority of the court), that judgments rendered in any foreign country (as, in this case, France) by the laws of which judgments rendered in the United States are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in the United States, but are only prima facie evidence of the justice of the plaintiff's claim.[88]

Even before these decisions by the supreme court of the United States, the inferior federal courts had often been called upon to deal with the question of the effect to be given to foreign judgments, and had invariably, in more recent times, decided for the rule which holds such judgments conclusive. Thus in a case in the circuit court for the northern district of Ohio, it was held that the judgment of a court of competent jurisdiction in Canada, in a suit in which the defendant appeared by counsel, should be held conclusive in the absence of fraud; and that it was immaterial that the

[88] Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95. And see Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133.

judgment was rendered in the defendant's absence and without his knowledge, when he did not deny the authority of the attorney to appear for him.[84] It was remarked by Ricks, J.: "I think the doctrine as maintained by the later English and American cases, to which reference has been made, has advanced the courts one stage in the process of simplifying the administration of justice. It is important that there should be a limitation to litigation, and that parties, as to matters upon which they had a full hearing in the court of original and competent jurisdiction, should not be permitted to open and retry issues once fairly determined, whenever and wherever they have an opportunity to do so, by defending against judgments rendered in a foreign country to which they were properly made parties." And a recent decision of the circuit court for the southern district of New York holds that a foreign judgment in personam, rendered in a court of a civilized country having jurisdiction of the subject-matter, in a cause involving the consideration of ordinary mercantile transactions between the parties, and in which the defendant appeared and took part in the proceedings, cannot be impeached when sued on here, although, at the trial, the defendant was denied the benefit of our rules of evidence and procedure, and although the judgment was based on false testimony and was erroneous.[85]

From this review of the decisions it will have become apparent that, notwithstanding an occasional adverse dictum and perhaps one or two positive rulings, the general tendency of the more recent American cases has been steadily and uniformly towards the position finally reached by the English courts. Since our judges have had the benefit of the reasoning and authority of the later cases in the mother country, hardly any decisions have been made in which the once generally recognized doctrine has not been repudiated. It is true these new rulings have been confined to a few states. But it does not appear that the question has arisen of late years in the

[84] McMullen v. Richie, 41 Fed. 502, 8 L. R. A. 268. See, also, New York, L. E. & W. R. Co. v. McHenry (S. D. N. Y.) 17 Fed. 414.

[85] Hilton v. Guyott, 42 Fed. 249 (April, 1890). The learned and very sensible opinion in this case, containing citations to numerous authorities, was written by Wallace, J.

others, and there is every reason to believe that all our courts will eventually agree in the new and better rule. Perhaps it cannot yet be said that the status of foreign judgments is irrevocably settled in this country. But it is a safe prophecy that the doctrine which makes them conclusive on the merits will receive the support of almost every fresh decision in the coming years.

§ 830. Arguments on the Question.

The chief argument in support of the thesis that full faith and credit should be given to the judgments of foreign tribunals is one which rests on grounds of convenience and necessity. Nowhere has it been presented with greater clearness or ability than by Mr. Justice Story in his learned treatise on the Conflict of Laws. "It is indeed very difficult to perceive," says he in the work referred to, "what could be done if a different doctrine were maintainable to the full extent of opening all the evidence and merits of the cause anew in a suit upon the foreign judgment. Some of the witnesses may be since dead, some of the vouchers may be lost or destroyed. The merits of the cause, as formerly before the court upon the whole evidence, may have been decidedly in favor of the judgment; upon a partial possession of the original evidence, they may now appear otherwise. Suppose a case purely sounding in damages, such as an action for an assault, for slander, for conversion of property, for a malicious prosecution, or for a criminal conversation. Is the defendant to be at liberty to retry the whole merits, and to make out, if he can, a new case upon new evidence? Or is the court to review the former decision, like a court of appeal, upon the old evidence? In a case of covenant, or of debt, or of a breach of a contract, are all the circumstances to be re-examined anew? If they are, by what laws or rules of evidence and principles of justice is the validity of the original judgment to be tried? Is the court to open the judgment and to proceed ex æquo et bono? Or is it to administer strict law, and stand to the doctrines of the local administration of justice? Is it to act upon the rules of evidence acknowledged in its own jurisprudence, or upon those of the foreign jurisprudence? These and many more questions might be put to show the intrinsic difficulties of the subject. Indeed the rule that the judgment is to be prima

facie evidence for the plaintiff would be a mere delusion, if the defendant might still question it by opening all or any of the original merits on his side, for under such circumstances it would be equivalent to granting a new trial." [86]

§ 831. Reason of the Recognition of Foreign Judgments.

We may next inquire how, as a matter of municipal law, a judgment rendered in a foreign country comes to be available as a cause of action or as a defense. The earlier decisions, as well as many of the text-writers, sought to establish a juristic basis for this recognition of foreign judgments on the ground of the comity which subsists between nations and the mutual advantages to be secured by its exercise. Vattel thought that to undertake to examine the justice of a definitive sentence was an attack upon the jurisdiction of the sovereign who had passed it.[87] Bar has declared that "the majority of modern authors adhere to the view that comitas and the common interest of nations are the grounds of the recognition and of the execution of foreign judgments." The same writer feels constrained to "refer the recognition of foreign judgments, pronounced in accordance with foreign law, to the same grounds as those upon which we recognize foreign laws themselves. The admissibility of such a recognition rests upon the basis of friendly intercourse; but no state that desires to remain in such intercourse is in a position to exclude the application of foreign laws at its pleasure." [88] But the later English decisions (which we have already cited) have placed the matter upon a basis which is at once more satisfactory and more secure. "These adjudications," it is said in a recent case, "ignore any considerations of comity as a factor in influencing the effect of foreign judgments. They rest wholly on the practical and sensible doctrine, which is applied to domestic judgments, that a litigant who has had a fair opportunity to try his cause before a competent tribunal, and has availed himself of it, should acquiesce in the result, and, if he has reason to complain, should pursue those means for

[86] Story, Confl. Laws, § 607.
[87] Vatt. Law Nat. bk. 2, c. 7, §§ 84, 85; Story, Confl. Laws, § 585.
[88] Bar. Priv. Int. Law, § 125.

correcting error provided by the jurisprudence of the tribunal, instead of resorting to another court. This is a much safer and more reasonable doctrine than that of the earlier adjudications, and if it works injustice in occasional instances, works less hardship generally, and promotes justice upon the whole." [89] From one of the decisions here referred to we quote the following statement of Baron Parke: "Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that judgments of foreign and colonial courts are supported and enforced." [90]

§ 832. Scotch Law of Foreign Judgments.

Before leaving the subject of the conclusiveness of foreign judgments, it may be profitable to see how the matter stands in some other countries besides England and the United States. Foreign jurisprudence often furnishes analogies or precepts which are of substantial aid in the solution of doubtful questions in our own courts. In the law of Scotland, it appears, a peculiar distinction is made between decrees sustaining the plaintiff's contention and such as refuse to support it. This distinction is explained by Lord Kames in the following terms: "A foreign decree sustaining the claim is not one of those universal titles which ought to be made effectual everywhere. It is a title which depends on the authority of the court whence it issued, and therefore has no coercive authority extra territorium. And yet, as it would be hard to oblige the person who claims on a decree to bring a new action against his party in every country to which he may retire, therefore common utility, as well as regard to a sister-court, have established a rule among all civilized nations, that a foreign decree shall be put in execution, unless some good exception be opposed to it in law or in equity; which is making no wider step in favor of the decree than to presume it just until the contrary be proved. . . . . A foreign decree which, by dismissing the claim, affords an exceptio rei judicatæ

[89] Hilton v. Guyott (C. C.) 42 Fed. 257.
[90] Williams v. Jones, 13 Mees. & W. 633.

against it, enjoys a more extensive privilege. We not only presume it to be just, but will not admit any evidence of its being unjust. The reasons follow. A decreet-arbitral is final by mutual consent. A judgment-condemnator ought not to be final against the defendant because he gave no consent. But a decreet-absolvitor ought to be final against the plaintiff, because the judge was chosen by himself; with respect to him at least it is equivalent to a decreet-arbitral. Public utility affords another argument extremely cogent. There is nothing more hurtful to society than that law-suits be perpetual. In every law-suit there ought to be a ne plus ultra, some step that ought to be ultimate; and a decree dismissing a claim is in its nature ultimate." [91] This distinction is closely analogous to that attempted to be made by Lord Chief Justice Eyre,[92] and which at one time appeared to prevail in English law. But it is totally inconsistent with the settled doctrine of the latest cases, both there and in this country, by which a foreign judgment is equally conclusive whether used as a cause of action or presented as a defense.

§ 833. French Law.

In France, by the Ordinance of 1629, article 121, it was provided that "judgments rendered in foreign countries are not to be executed in France. French citizens against whom they are rendered may, notwithstanding such judgments, contest their rights anew, as untouched, before the French tribunals." The provisions of the codes mark an advance from this position, in that they make such judgments susceptible of execution upon being confirmed by a French court.[93] But in the opinion of the best writers, the new laws do not go to the extent of making the judgment conclusive upon the merits. The notion that the procedure contemplated involves no more than the issuing of an exequatur as of course, without any

[91] 2 Kames, Eq. (3d Ed., 1778) p. 365.

[92] Phillips v. Hunter, 2 H. Bl. 410. See supra, § 826.

[93] Civ. Code, art. 2123, provides that "L'hypothèque judiciaire [i. e., lien] ne peut pareillement résulter des jugements rendus en pays étranger, qu'autant qu'ils ont été déclarés exécutoires par un tribunal français; sans préjudice des dispositions contraires qui peuvent être dans les lois politiques ou dans les traités." See, also, Code de Procedure Civile, art. 546.

re-examination of the grounds of the controversy, is by them condemned as erroneous. Thus a learned author observes: "It seems to us that, after the decisions which we have just cited, which are all founded upon the great principle of the independence of nations, and of the absolute lack of power in the officers of a foreign sovereignty within the territory of another sovereignty,—we must regard our jurisprudence as irrevocably committed to the consequences of that principle, and that all judgments rendered in a foreign country, without exception, can have no execution in France until after they have been made executory, upon an examination of the cause, by a French tribunal, before which the parties must set up and contest, anew, the grounds upon which the action is founded." [94] But it must be added that between many of the countries of continental Europe there exist treaties providing for the recognition and enforcement of decrees rendered by their respective courts. And of course the foregoing rule has no application to the judgments of a nation with which France stands in a treaty relation of this character. As to the other European states, it is somewhat difficult to ascertain their practice in regard to the effect of foreign judgments. But it is said that the courts of Holland "are accustomed by the principle of reciprocity to give effect in their territories to the judgments of foreign states which show the same comity to theirs." [95]

§ 834. Canadian Doctrine of Foreign Judgments.

The courts in Canada have adopted the principle, now generally prevalent in England and the United States, that a foreign judgment, duly proven, is conclusive when made the basis of a suit, in the absence of fraud, want of jurisdiction, or evident mistake.[96] So also it is said that a plea, by which it is alleged that a suit has already

[94] Toullier, Droit Civ. Franc., c. 6, § 3, no. 82–87. See, also, Merlin, Questions de Droit, "Jugement," § 14; Emerigon, Des Assur. bk. 1, c. 4, § 8. The whole subject of the French law of foreign judgments is discussed with learning and discrimination in 2 Kent, Comm. 121, note. See, also, Story, Confl. Laws, §§ 615–617.

[95] Henry, Personal & Real St. p. 76.

[96] Warrener v. Kingsmill, 8 U. C. Q. B. 407; Law v. Hansen, 25 Can. Sup. Ct. Rep. 69. Compare Rice v. Holmes, 16 Rap. Jud. Que. C. S. 492.

been brought and decided in a competent foreign tribunal (in this case the superior court of New York) by the same plaintiff against the same defendant, for the same cause of action, is a good plea, more especially if it sets up payment of the judgment by the defendant.[97]

§ 835. Jurisdiction may be Inquired into.

Leaving now the subject of the conclusiveness of foreign judgments, we proceed to inquire into the causes for which their validity may be challenged or impeached. And first, as to jurisdiction. It is now a settled and well recognized rule that a judgment of a foreign court is always open to impeachment on the ground of a want of jurisdiction over the cause or the parties.[98] At the same time, "a judgment of a foreign court, complete and regular upon its face, is prima facie valid. It follows that a complaint upon such foreign judgment need not allege that the court by which it was rendered had jurisdiction either of the cause or of the parties."[99] As it was said in another American case, "it is an elementary rule that the jurisdiction of courts of general jurisdiction is to be presumed, and it follows that the judgments and decrees of such courts are in all cases of at least prima facie validity. In asserting such a judgment or decree as a cause of action, or as a ground of defense, the pleader need not state jurisdictional facts. . . . . And the presumptions in favor of jurisdiction are the same whether the judgment relied on is domestic, foreign, or from one of the sister states of this Union."[100] "A foreign judgment," says another learned court, "rendered without jurisdiction may be assailed in either a direct

[97] Vaughan v. Campbell, 5 L. C. R. 431.

[98] Schibsby v. Westenholz, L. R. 6 Q. B. 155; Novelli v. Rossi, 2 Barn. & Adol. 757; Don v. Lippmann, 5 Clark & F. 1; Ferguson v. Mahon, 11 Adol. & El. 179; Carleton v. Bickford, 13 Gray (Mass.) 591, 74 Am. Dec. 652; Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Borden v. Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Andrews v. Herriot, 4 Cow. (N. Y.) 524, note; Kerr v. Kerr, 41 N. Y. 272; Arnott v. Webb, 1 Dill. 362, Fed. Cas. No. 562; Rose v. Himely, 4 Cranch, 241, 2 L. Ed. 608; Long v. Hammond, 40 Me. 204; Wood v. Wood, 78 Ky. 624; Robertson v. Struth, 5 Q. B. 941.

[99] Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661; Horton v. Critchfield, 18 Ill. 133, 65 Am. Dec. 701; Robertson v. Struth, 5 Q. B. 941.

[100] Bruckman v. Taussig, 7 Colo. 561, 5 Pac. 152. And see Christian &

or collateral proceeding. Although the recitals contained in the judgment, that service was made, raise a strong presumption in favor of the jurisdiction and of the truth of the recitals, yet the plaintiff [defendant] may show by extrinsic evidence, if he can, that no service was actually made. Strong proof will be required to overthrow the presumption of jurisdiction raised by the recitals; but if it is clearly shown that the defendant was not served with process, and did not voluntarily appear or submit to the jurisdiction of the court, the recitals are of no value." [101]

§ 836. Judgments against Non-Residents.

The question of the right to impeach a foreign judgment for want of jurisdiction has almost always arisen in cases where the defendant was not a resident of the state or country in which the judgment was rendered. Our courts have been emphatic in declaring that a judgment rendered in a foreign country against a citizen of the United States, without personal service or notice or appearance, is a mere nullity.[102] And this is also the law in England. It was there recently held that a judgment of a foreign court, obtained against a defendant on default of an appearance, cannot be enforced in an English court where the defendant, at the time the suit was commenced, was not a subject of nor resident in the country in which the judgment was obtained; for there existed nothing imposing on the defendant any duty to obey the judgment.[103] It is obvious that this question may assume many shapes, according as we consider whether the person to be affected was a citizen of the foreign country or an alien, whether he was a resident within its territory or not, whether or not he voluntarily submitted himself to the jurisdiction, whether the judgment professes to impose a personal liability or to operate only on property within the state. These and other questions may all affect the validity of the sentence. Out of all these possible cases,

Craft Grocery Co. v. Coleman, 125 Ala. 158, 27 South. 786; Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133.

[101] Thorn v. Salmonson, 37 Kan. 441, 15 Pac. 588.

[102] Bischoff v. Wethered, 9 Wall. 812, 19 L. Ed. 829; Battle v. Jones, 41 N. C. 567; Moore v. Phillips, 10 Pa. Co. Ct. R. 552.

[103] Schibsby v. Westenholz, L. R. 6 Q. B. 155; Voinet v. Barrett, 55 Q. B. Div. 39.

those in which the foreign tribunal may have lawful jurisdiction have been selected and stated by Mr. Justice Fry, in a recent case in the Chancery Division, in terms which are as clear as the discrimination is sound and accurate. "What are the circumstances," inquires the learned judge, "which have been held to impose upon the defendant the duty of obeying the decision of a foreign court? Having regard to that case [104] and to Copin v. Adamson,[105] they may, I think, be stated thus. The courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment has been obtained; where he was resident in the foreign country when the action began; where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued; where he has voluntarily appeared; where he has contracted to submit himself to the forum in which the judgment was obtained; and possibly, if Becquet v. MacCarthy [106] be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction." [107]

Our own courts have answered these questions in substantially the same way. Thus, it is held that a judgment by default between parties who are both citizens of a foreign country, rendered by a court of that country having jurisdiction, is valid and enforceable here, although the defendant, being out of that country at the time, was not personally served.[108] Again, it is no defense to an action on a foreign judgment that the defendant was served with process, in the action wherein such judgment was rendered, while transiently sojourning in that country, and that such service was so made and timed for the purpose of embarrassing the defendant, and obtaining an unjust advantage, by preventing his having a fair opportunity to make his defense except at the cost of prolonging indefinitely his stay abroad.[109] In another case, where suit was brought on a judg-

[104] Schibsby v. Westenholz, L. R. 6 Q. B. 155.

[105] L. R. 9 Exch. 345.

[106] 2 Barn. & Adol. 951.

[107] Rousillon v. Rousillon, 14 Ch. Div. 351, 371. See, also, General Steam Nav. Co. v. Gouillou, 11 Mees. & W. 877.

[108] Ouseley v. Lehigh Val. Trust & Safe Deposit Co. (C. C.) 84 Fed. 602.

[109] Fisher v. Fielding, 67 Conn. 92, 34 Atl. 714, 32 L. R. A. 236, 52 Am. St. Rep. 270.

ment recovered in France, it appeared that the defendants were citizens and residents of the state of New York and had their principal place of business in New York city, but had a storehouse and an agent in Paris, and were accustomed to purchase large quantities of goods there. It was shown that their sole object in appearing and carrying on the litigation in the French court was to prevent property in their storehouse at Paris, belonging to them, and within the jurisdiction, but not in the custody, of the French court, from being taken in satisfaction of the judgment which might be recovered against them. But it was held that this did not show that the French court did not acquire competent jurisdiction of their persons.[110] On the other hand, in an action by an English corporation against a stockholder, a resident of New York, to recover money alleged to be due by way of calls on the stock, pursuant to a scheme of corporate reorganization, an order of an English court approving such scheme and declaring it to be binding on all persons interested, does not impose on the defendant, who was no party to the proceedings, any personal liability other than that resulting from his contract.[111]

Something must be added as to the summoning of nonresident defendants by public proclamation, or posting up notices, or other varieties of constructive service. It has been justly remarked that "there is no pretense to say that such modes of proceeding can confer any legitimate jurisdiction over foreigners who are non-residents and do not appear to answer the suit, whether they have notice of the suit or not. The effects of all such proceedings are purely local, and elsewhere they will be held to be mere nullities."[112] Thus, in a well known English case it was held that an action would not lie upon a judgment obtained by default in one of the colonies against a party who, upon the face of the proceedings, appeared only to have been summoned "by nailing up a copy of the declaration at the courthouse door."[113] But in another case it was considered that suit

[110] Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95.

[111] Bank of China, Japan & The Straits v. Morse, 44 App. Div. 435, 61 N. Y. Supp. 268.

[112] Story, Confl. Laws, § 546.

[113] Buchanan v. Rucker, 9 East, 192.

would lie in the English courts on a Scotch judgment of horning rendered against a Scotchman born. The court, however, added: "We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected." [114] In the next place it is to be observed that proceedings are frequently taken against non-resident foreigners by the attachment of real or personal property belonging to them and found within the jurisdiction. "In such cases," says a learned writer, "for all the purposes of the suit, the existence of the property so seized or attached within the territory constitutes a just ground of proceeding to enforce the rights of the plaintiff to the extent of subjecting such property to execution upon the decree or judgment. But if the defendant has never appeared and contested the suit, it is to be treated to all intents and purposes as a mere proceeding in rem, and not as personally binding on the party as a decree or judgment in personam; or, in other words, it only binds the property seized or attached in the suit, to the extent thereof, and is in no just sense a decree or judgment binding upon him beyond that property. In other countries it is uniformly so treated, and is justly considered as having no extraterritorial force or obligation." [115]

§ 837. Extra-Territorial Service of Process.

It is sometimes attempted to obtain jurisdiction of a non-resident foreigner by the personal service of process upon him at his domicile. This, however, is admitted on all sides to be ineffectual. It can have no greater force or virtue than a purely constructive service. It has been well said: "No sovereignty can extend its powers beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exercise of authority of this sort, beyond this limit, is a nullity. . A citizen of one state or country cannot be compelled to go into another state or country

[114] Douglas v. Forrest, 4 Bing. 686.

[115] Story, Confl. Laws, § 549; Burn v. Bletcher, 23 U. C. Q. B. 28; London & N. W. R. Co. v. Lindsay, 3 Macq. H. L. Cas. 99.

to litigate a civil action by means of process served in his own state or country. And a judgment obtained upon such service, where no appearance is made by the person so served, can impose no personal liability which will be recognized beyond the state in which the action originated." [116]

§ 838. Plea Negativing Jurisdiction.

In defending against a suit on a foreign judgment on the ground of want of notice, or want of jurisdiction, the defendant must explicitly negative every fact or circumstance from which the jurisdiction of the court over his person might be inferred.[117] A good illustration of this rule is found in one of the English cases cited, where, the action being upon a decree obtained against the defendant in the Court of Session in Scotland, the latter pleaded that he was not, at the time of the commencement of the suit in the Scotch court, or at any time during the proceedings therein, in Scotland, or at any place within the jurisdiction of the said court, nor was he, at any time before the making and pronouncing of the decree, in any manner, according to the course and practice of the said court, notified, nor did he then know of the proceedings, so that he could or might, by himself, his proctor, attorney, or agent, appear or plead, or in any way defend himself in the said action; nor did he appear to any of the proceedings; whereby the said decree was and is contrary to natural justice, and wholly inoperative and void. But it was held that the plea was insufficient. For, as remarked by Tindal, C. J., it contained no statement that the defendant was not resident in Scotland, or that he was not subject to the laws of that country during the time that these proceedings were had against him, or that he had no property in Scotland, or that he had no knowledge or notice of the proceedings,—for the allegation in regard to the lat-

[116] Shepard v. Wright, 59 How. Prac. (N. Y.) 512; Id., 35 Hun (N. Y.) 444, affirmed 113 N. Y. 582, 21 N. E. 724; McEwan v. Zimmer, 38 Mich. 765, 31 Am. Rep. 332; Smith v. Grady, 68 Wis. 215, 31 N. W. 477; Turnbull v. Walker, 5 Rep. 132, 67 Law T. (N. S.) 767.

[117] Cowan v. Braidwood, 1 Man. & G. 882; Reynolds v. Fenton, 3 C. B. 187; Smith v. Nicolls, 5 Bing. N. C. 208; Montreal Min. Co. v. Cuthbertson, 9 U. C. Q. B. 78; McLean v. Shields, 9 Ont. 699; Addams v. Worden, 6 L. C. R. 237; Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133.

ter point might mean merely that he had no such notice as he ought in strictness to have had.[118] In a case where the plaintiff declared in assumpsit on a foreign judgment against two defendants, and they pleaded that one of them had never been served with process, and had no notice whatever of the proceedings in the foreign court, it was held that the plea was bad, as setting up a matter of defense for both of the defendants which applied to one only.[119]

§ 839. Foreign Judgment in Summary Proceedings.

The reluctance of the courts to give effect to a foreign judgment which was taken in summary proceedings, or in derogation of the common law, or justified only by the local statutes, appears strongly in the recent case of Anderson v. Haddon.[120] This was an action brought by the liquidators of a Scotch bank against the defendant, a resident of New York, to recover the amount of a call, upon the shares of stock of said bank which were owned by him, imposed by a judgment or decree of the Court of Session or Lord Ordinary of Scotland. The call was imposed under the provisions of an English statute, providing for the incorporation, regulation, and winding up of trading corporations. It authorized the Scotch Court of Session, during session, and the Lord Ordinary on bills during vacation, "on production by the liquidators of such a company of a list, certified by them, of the names of the contributories liable in payment of any calls which they may wish to enforce, and of the amount due and the date thereof, to pronounce forthwith a decree against such contributories for payment of the sums so certified to be due by each of them respectively, with interest from the said date until payment, in the same way and to the same effect as if they had severally consented to registration for execution, on a charge of six days, of a legal obligation to pay such calls and interest." At the time the decree was made, and ever since, the defendant was a resident of New York. It was held, "that inasmuch as the mode provided by the act of Great Britain of ascertaining the liability of the defendant is sum-

[118] Cowan v. Braidwood, 1 Man. & G. 882.

[119] Bacon v. McBean, 3 U. C. Q. B. 305.

[120] 33 Hun (N. Y.) 435. And see Bank of China, Japan & The Straits v. Morse, 44 App. Div. 435, 61 N. Y. Supp. 268.

mary, in derogation of the common law, and in the nature of bankruptcy proceedings, it has no extra-territorial force, either by virtue of its own inherent elements or any provision contained in the act itself creating a personal responsibility which could be enforced in the manner adopted in this action," and consequently that the present action could not be maintained. This decision, it will be observed, was made in that state which has been the most liberal in recognizing and enforcing foreign judgments. But probably the ruling was justified by the peculiar circumstances.

§ 840. Repugnance of Judgment to Natural Justice.

Throughout the books there are many dicta to the effect that it is good ground for impeaching a foreign judgment, and avoiding its effect, that it is "repugnant to natural justice." The term is vague, and might at first sight seem to allow of an investigation of the moral rightness of the decree. But it has been explained that the repugnance to natural justice in respect to which a foreign judgment is impeachable in an action upon it, is an injustice in reference to the conduct or mode of procedure of the foreign court, as in cases where the judgment is given without any notice to the defendant or without affording him an opportunity for defense, but not in reference to the merits of the action.[121] And although the method of conducting the trial, the rules of evidence applied, or other details of practice, may differ from those to which we have been accustomed in our own courts, we must not be too hasty in assuming that therefore the result is contrary to natural justice. "The methods of investigation in different countries," it has recently been said, "are adjusted to the conceptions of expediency and propriety that prevail in each, and it would be mere bigotry to assert that, upon the whole, the truth of disputed facts is not as well ascertained in France or Holland or Germany as it is in England or the United States. Our law of evidence is largely a series of negations, sedulously framed, to exclude from consideration all indicia of the truth which do not fall within the class of those it regards as competent and safe, while in

[121] Crawley v. Isaacs, 16 Law T. (N. S.) 529. See, also, Liverpool Marine Credit Co. v. Hunter, 3 Ch. App. 479.

continental countries a larger latitude of investigation is indulged. In matters of evidence and procedure, to say nothing about the weightier matters of law, the wisdom of yesterday is the folly of to-day; and it is doubtful whether our present methods do not differ as greatly from those of the recent period, when parties were not permitted to testify, as they do from the methods of continental countries. Who can say with reason that our system of investigation is more infallible than that of France, or that a French citizen, sued here, could not as justly complain of our rules of evidence, or of a bill of discovery which compels him to exhibit his case in advance to his adversary, as one of our citizens sued in a French court could of the methods of procedure there?" [122]

§ 841. Local or Police Regulations of Foreign Country not Enforced.

An important exception to the rule which requires faith and credit to be given to foreign judgments remains to be noticed. The local policy, the penal or revenue laws, and the police regulations of a country have no extra-territorial force. No other state or nation is bound to recognize or enforce them. No duty or obligation which they impose has validity beyond the state's own limits. And consequently it follows that no foreign power can be expected to give recognition or effect to decrees or sentences founded on such laws or regulations.[123] For example, the sentence of a court of criminal jurisdiction in a foreign state, by which the exercise of the civil rights of men may be suspended or abridged, is limited in its operation to the state itself in which the sentence was rendered, and does not deprive an individual of his natural rights beyond that state. The enforcement of such a sentence by a foreign power would be a violation of the law of nations.[124] This principle also furnished the ground of the decision in the peculiar case of De Brimont v. Penniman.[125] It there appeared that the plaintiff, who was a citizen of

[122] Hilton v. Guyott (C. C.) 42 Fed. 253. And see same case on appeal 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95.

[123] Ogden v. Folliott, 3 Term R. 733; The Antelope, 10 Wheat. 66, 123, 6 L. Ed. 268; Hohner v. Gratz (C. C.) 50 Fed. 369; Story, Confl. Laws, §§ 620, 621.

[124] Addams v. Worden, 6 L. C. R. 237.

[125] 10 Blatchf. 436, Fed. Cas. No. 3,715.

France, had married the daughter of the defendant, an American citizen, and that there was issue of the marriage, and that the wife died. It was shown that a French statute provides that a father-in-law must make an allowance to a son-in-law who is in need, so long as a child of the marriage survives. The defendant being temporarily resident in France, the plaintiff sued him, under this law, in a French court, and obtained a judgment for an annual allowance payable in monthly installments. On this judgment an action was brought in a federal court in New York. But it was held that the suit could not be maintained. The court said that the laws of France upon which the decree was made, and such decree founded thereon, were not founded upon principles of universal application, but were local in their nature and operation, and in the nature of police regulations. They were designed to regulate the domestic relations of those who reside in that country and to protect the public against pauperism. They had, however, no extra-territorial significance, but must be executed upon persons and property within their jurisdiction.

§ 842. Mistake of Law as Ground of Impeachment.

Since, on the most general principles, no domestic judgment is ever open to collateral attack on the mere ground of its being erroneous as a matter of law, and since, as we have seen, the modern tendency is to hold all foreign judgments conclusive on the merits, and since, further, it is almost wholly impracticable for one of our courts to review the decisions of a foreign tribunal in reference to the correctness of its interpretation and application of its own laws,—for these reasons it should be no ground for impeaching a foreign judgment that it is erroneous in law. And this view is taken in one of the best of the English cases.[126] It was there conceded that the judgment of a foreign court having jurisdiction over the subject-matter could not be questioned in a domestic tribunal, on the ground that the foreign court had mistaken the law of its own country, or had come, on the evidence, to an erroneous conclusion as to the facts. But the doctrine of certain other cases is that the proceedings in foreign courts must be presumed to be consistent with the foreign

[126] Scott v. Pilkington, 2 Best & S. 11.

law until the contrary is distinctly shown, and the principles adopted by a foreign jurisdiction, for example in assessing damages, cannot be impugned, unless contrary to natural justice, or proved to be not conformable to the foreign law.[127]

§ 843. Mistaken Conception of Foreign Law.

The case is somewhat different, however, when the court which renders the judgment undertakes to interpret or apply the law of some foreign country, and the judgment afterwards comes to be relied on as a claim or defense in the country whose law was so applied. Is it then impeachable on the ground of a mistaken conception of such law? This question, so far as it has been adjudicated in this country, seems to have been answered in the affirmative. It has been held that where a foreign court, not of admiralty, has decided a case on different principles from those here recognized, and leading to a different result from what would be here arrived at, though professedly deciding according to our law, our courts are not concluded by such decision.[128] But a case has recently been decided in England, in which the whole subject received the most careful and exhaustive attention, and conclusions were reached which have certainly settled the English law upon the point, and will undoubtedly go far to incline our own courts in the same direction. We refer to the case of Godard v. Gray.[129] It was there ruled that it is no bar to an action on a judgment in personam of a foreign court, having jurisdiction over the parties and the cause, that the foreign tribunal has put a construction upon an English contract which, according to English law, is erroneous. Mr. Justice Blackburn, in delivering the opinion of the court, spoke as follows: "We can see on the face of the proceedings that the foreign tribunal has made a mistake on the construction of an English contract, which is a question of English law, and that in consequence of that mistake judgment has been given for an amount probably greater than, or at all events different from, that for which it would have been

[127] Alivon v. Furnival, 1 Cromp., M. & R. 277; Becquet v. MacCarthy, 2 Barn. & Adol. 951.

[128] Lang v. Holbrook, Crabbe, 179.

[129] L. R. 6 Q. B. 139.

given if the tribunal had been correctly informed what construction the English contract bore according to English law. The question raised by the plea is, whether this is a bar to the action brought in England to enforce that judgment, and we are all of opinion that it is not and that the plaintiff is entitled to judgment." After examining with some care the grounds of the recognition of foreign judgments, the admissibility of pleas of want of jurisdiction and of fraud, and the modern doctrine of the conclusiveness of such judgments on the merits, the learned judge continued: "It is broadly laid down by the very learned author of Smith's Leading Cases, in the original note to Doe v. Oliver, that 'it is clear that if the judgment appear on the face of the proceedings to be founded on a mistaken notion of the English law,' it would not be conclusive. For this he cites Novelli v. Rossi,[130] which does not decide that point, and no other authority; but the great learning and general accuracy of the writer makes his unsupported opinion an authority of weight, and accordingly it has been treated with respect. In Scott v. Pilkington [2 Best & S. 42], the court expressly declined to give any opinion on the point not then raised before them. But we cannot find that it has been acted upon; and it is worthy of note that the present very learned editors of Smith's Leading Cases have very materially qualified his position and state it thus: If the judgment 'be founded on an incorrect view of the English law, knowingly or perversely

[130] 2 Barn. & Adol. 757. In this case it appeared that R., who had indorsed a bill over to N., brought an action in a French court, at the place of his residence, to secure himself against liability on the bill, alleging that the acceptance of the same had been cancelled. (This was true; but the banker's clerk who had inadvertently cancelled the acceptance, had immediately written opposite to it "cancelled by mistake.") To this action he made the drawer, the intermediate indorsers, and N. parties defendant. The judgment of the French court, which was affirmed on appeal, declared R. and the other parties discharged from liability. It was held that the French courts had mistaken the law of England as to the effect of the cancellation, and therefore R. was still liable at N.'s suit for the debt in respect of which the bill was given, notwithstanding the foreign judgment. Lord Tenterden said: "It is unfortunate for the defendant if the law of England compels him to pay this debt, while the sentence of the French court, confirmed on appeal, prevents his recovering the amount from the indorsers and drawers of the bill abroad. But this is the consequence of his own act."

acted on.' The doctrine thus qualified does not apply to the present case, and there is therefore no need to inquire how far it is accurate. But the doctrine as laid down by Mr. Smith does apply here, and we must express our opinion on it, and we think it cannot be supported, and that the defendant can no more set up as an excuse, relieving him from the duty of paying the amount awarded by the judgment of the foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake of the English law, than he could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved, or as to any other question of fact. It can make no difference that the mistake appears on the face of the proceedings. That, no doubt, greatly facilitates the proof of the mistake; but if the principle be to inquire whether the defendant is relieved from a prima facie duty to obey the judgment, he must be equally relieved, whether the mistake appears on the face of the proceedings or is to be proved by extraneous evidence. Nor can there be any difference between a mistake made by the foreign tribunal as to English law and any other mistake. No doubt the English court can, without arrogance, say that where there is a difference of opinion as to English law, the opinion of the English tribunal is probably right; but how would it be if the question had arisen as to the law of some of the numerous portions of the British dominions where the law is not that of England? The French tribunal, if incidentally inquiring into the law of Mauritius, where French law prevails, would be more likely to be right than the English court; if inquiring into the law of Scotland, it would seem that there was about an equal chance as to which took the right view. If it was sought to enforce the foreign judgment in Scotland, the chances as to which court was right would be altered. Yet it surely cannot be said that a judgment shown to have proceeded on a mistaken view of Scotch law could be enforced in England and not in Scotland, and that one proceeding on a mistaken view of English law could be enforced in Scotland and not in England. If indeed foreign judgments were enforced by our courts out of politeness and courtesy to the tribunals of other countries, one could understand its being said that though our courts would not be so rude as to inquire whether the foreign court had made a

mistake, or to allow the defendant to assert that it had, yet if the foreign court itself admitted its blunder they would not then act; but it is quite contrary to every analogy to suppose that an English court of law exercises any discretion of this sort. We enforce a legal obligation, and we admit any defense which shows that there is no legal obligation or a legal excuse for not fulfilling it; but in no case that we know of is it ever said that a defense shall be admitted if it is easily proved, and rejected if it would give the court great trouble to investigate it. Yet on what principle can we admit as a defense that there is a mistake of English law apparent on the face of the proceedings, and reject a defense that there was a mistake of Spanish or even Scotch law apparent in the proceedings, or that there was a mistake of English law not apparent on the proceedings, but which defendant avers that he can show did exist? The whole law was much considered and discussed in Castrique v. Imrie [L. R. 4 H. L. 414], where the French tribunal had made a mistake as to the English law, and under that mistake had decreed the sale of the defendant's ship. The decision of the House of Lords was that the defendant's title derived under that sale was good, notwithstanding that mistake, Lord Colonsay pithily saying: 'It appears to me that we cannot enter into an inquiry as to whether the French courts proceeded correctly either as to their own course of procedure, or their own law, nor whether, under the circumstances, they took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were right in their views of the English law. The question is whether, under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship.'"

§ 844. Whether Impeachable for Fraud.

In the present state of the English authorities, it seems to be well settled that fraud may always be set up as a ground of impeachment against a foreign judgment, and that if it be shown that fraud was successfully practised in the concoction or procuring of the judgment, the courts will treat it as of no effect, and will refuse to recognize or

enforce it.[131] And so far as the question has been considered by our own courts, this may be said to be also the prevailing doctrine in this country.[132] But the fraud must be practised in the very obtaining of the judgment. It is not enough that it lies back of that and taints the contract or obligation put in suit before the foreign tribunal. It is good cause, for instance, for attacking such a judgment to show that the judges who rendered it were persons who were interested in the property in dispute, and decided in their own favor, and if that be established, the judgment will be disregarded.[133] But it has also been held that inasmuch as fraud is available as a defense to an action at law upon such a judgment, chancery will not interfere with the suit, but will leave the defendant to make that defense at law.[134] In a recent English case, where the action was upon a judgment recovered by the plaintiff against the defendant in a Russian court, the latter pleaded that the judgment was procured by the fraud and deceit of the plaintiff and by false representations and false evidence given to the court, and it was held that the defense was good and sufficient, and this notwithstanding the question of the alleged fraud had been investigated and negatived in the foreign court.[135] But in a late American case, where the same question arose, this ruling was disapproved, and it was stated that the doctrine of the English decision was not borne out by the cases cited in its support, and the opinion was expressed that false testimony and the suppression of the truth do not constitute the kind of fraud by which a judgment is vitiated and may be nullified.[136] In this country, it remains to be seen

[131] Henderson v. Henderson, 6 Q. B. 288, 298; Reimers v. Druce, 23 Beav. 145; Price v. Dewhurst, 8 Sim. 279; Bank of Australasia v. Nias, 16 Q. B. 717; Godard v. Gray, L. R. 6 Q. B. 139; Ochsenbein v. Papelier, 8 Ch. App. 695; Cammell v. Sewell, 3 Hurl. & N. 617; Bowles v. Orr, 1 Younge & C. 464; Abouloff v. Oppenheimer, 10 Q. B. Div. 295; Story, Confl. Laws, § 608.

[132] Rankin v. Goddard, 54 Me. 28, 89 Am. Dec. 718; Ward v. Quinlivin, 57 Mo. 425. See Fisher v. Fielding, 67 Conn. 92, 34 Atl. 714, 32 L. R. A. 236, 52 Am. St. Rep. 270; Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95. Per contra, see Ambler v. Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202.

[133] Price v. Dewhurst, 8 Sim. 279.

[134] Ochsenbein v. Papelier, 8 Ch. App. 695.

[135] Abouloff v. Oppenheimer, 10 Q. B. Div. 295.

[136] Hilton v. Guyott (C. C.) 42 Fed. 252.

whether the growing tendency to place foreign judgments on the same level with those rendered in a sister state, and the increasing disfavor with which the courts regard a plea of fraud in an action upon a judgment of the latter species, will not have the effect to raise foreign judgments above collateral attack on this ground.

§ 845. Judgment must be Final.

In order that a judgment recovered in a foreign country may be effective as a bar to another action, or as a cause of action in itself, it must distinctly appear that it was final and conclusive in the country where rendered, according to the law of that place.[137] The same rule is recognized in this country. Thus, an interlocutory decree of an English court is not conclusive against the defendant in an action in New York by the same plaintiff and for the same relief as was granted by such interlocutory decree.[138]

§ 846. Effect of Pendency of Appeal.

A foreign judgment which is to be sued on or otherwise enforced "must be such as lays on the defendant a present duty to pay. If in its own country it cannot be executed pending the time allowed for appealing, or pending an appeal, it cannot be enforced in England during the interval; but if there is no such stay of execution in its own country, the pendency of an appeal will not be a bar to an action in England, though it may afford ground for the equitable interposition of the English court to prevent the possible abuse of its process, and on proper terms to stay execution in the action." [139] It has also been said by a learned English judge: "I apprehend that every judgment of a foreign court of competent jurisdiction is valid, and may

[137] Plummer v. Woodburne, 4 Barn. & C. 625; Smith v. Nicolls, 5 Bing. N. C. 208; Paul v. Roy, 15 Beav. 433; Frayes v. Worms, 10 C. B. (N. S.) 149; Nouvion v. Freeman, L. R. 15 App. Cas. 1.

[138] Munn v. Cook, 55 Hun, 608, 8 N. Y. Supp. 698.

[139] West. Pr. Int. Law, § 295; Scott v. Pilkington, 2 Best & S. 11. Where the judgment of a Mexican court had been appealed from, and it could not be shown that the appeal had been disposed of before Mexico ceased to control the territory where the land lay, it was held, in an action on such judgment in a court of Texas, that it was not final so as to sustain the action. Trevino v. Fernandez, 13 Tex. 630.

be the foundation of an action in our courts, though subject to the contingency that, by adopting a certain course, the party against whom the judgment is obtained might cause it to be vacated or set aside. But until that course has been pursued, the judgment remains in full force and capable of being sued upon." [140]

§ 847. No Merger of Original Cause of Action.

It is well settled in England that the recovery of a judgment in a foreign court by the plaintiff will not be treated as a merger of the original cause of action, and the plaintiff may sue thereon again in the domestic courts.[141] Such a judgment, it is said, is not technically a record, and consequently is not a security of a higher nature than the prior simple contract debt. Hence the principle of merger does not apply, and the judgment is not pleadable in bar of an action brought in England for the same cause. And the same doctrine prevails in America in regard to judgments rendered abroad (as distinguished from such as are rendered in a sister state); there is no merger.[142] "It is held in these cases," says the supreme court of Vermont, "that a foreign judgment when shown in evidence upon a matter within the jurisdiction of the court, and in which the court had jurisdiction of the parties, so that they were personally bound by the judgment in the country where rendered, is conclusive upon the matter therein adjudicated. But it at the same time is held that the original cause of action is not so merged by that judgment that it is incapable of being the subject of a suit in a country foreign to that in which the judgment was recovered. The books are uniform in making the distinction between merger of the cause of action and conclusiveness of effect, as matter of evidence, when the effect of a foreign judgment is brought in question in a suit upon the same orig-

[140] Vanquelin v. Bouard, 15 C. B. (N. S.) 341, 367.

[141] Bank of Australasia v. Nias, 16 Q. B. 717; Bank of Australasia v. Harding, 9 C. B. 661; Smith v. Nicolls, 5 Bing. N. C. 208; Hall v. Odber, 11 East, 118.

[142] Hays v. Cage, 2 Tex. 501; Wilson v. Tunstall, 6 Tex. 221; Frazier v. Moore's Adm'r, 11 Tex. 755; Turner v. Lambeth, 2 Tex. 365; Wood v. Gamble, 11 Cush. (Mass.) 8, 59 Am. Dec. 135; Lyman v. Browne, 2 Curt. 559, Fed. Cas. No. 8,627; New York, L. E. & W. R. Co. v. McHenry (C. C.) 17 Fed. 414.

inal cause of action."[143] An exception to the universal acceptance of this rule must be noted in the case of Louisiana, where the code gives the same effect to foreign judgments as to those coming from another state of the Union, with the consequence that the former, equally with the latter, operate as a merger of the original claim.[144] But it will further be observed that a plea of judgment formerly recovered in a foreign court and payment of the same by the defendant, will be a good bar to an action brought at home for the same cause.[145] As a necessary complement to these propositions it may be added that the rule is well recognized that it is no ground for staying proceedings in an action, or for a plea in bar, that proceedings are pending between the same parties for the same cause of action in the courts of a foreign country.[146] This last rule is also established in the French law and in the jurisprudence of Canada.[147]

§ 848. Form of Action on Foreign Judgment.

According to the rule now prevailing in England and the United States, an action upon a foreign judgment may be brought either in debt or assumpsit, the liability of the defendant arising upon the implied contract to pay the amount of the foreign judgment.[148] In Canada, however, the courts hold that assumpsit only, and not debt, is the proper form for an action on a judgment recovered abroad.[149]

§ 849. Pleading and Exhibiting Foreign Judgment.

In order that a foreign judgment should be admissible in evidence, it is necessary that the exemplification of it which is produced should be duly authenticated. And this authentication should consist of the seal of the court, if it has one, the certificate of the officer in

143 Eastern Townships Bank v. Beebe, 53 Vt. 177, 38 Am. Rep. 665.

144 Jones v. Jamison, 15 La. Ann. 35.

145 Barber v. Lamb, 8 C. B. (N. S.) 95.

146 Cox v. Mitchell, 7 C. B. (N. S.) 55; Scott v. Seymour, 1 Hurl. & C. 219; Bayley v. Edwards, 3 Swanst. 703.

147 Russel v. Field, Stu. K. B. 558.

148 Grant v. Easton, 13 Q. B. Div. 302; Mellin v. Horlick (C. C.) 31 Fed. 865.

149 McFarlane v. Derbishire, 8 U. C. Q. B. 12.

whose custody the record remains, the attestation of the principal judge of the court to the official character of the person certifying, and the whole fortified by the certificate of the executive department of the state or country and the impress of its great seal.[150] Sometimes it will happen that not all these means are available, and in that case the courts will be satisfied with the nearest approach that the circumstances permit to this typical method of proving the judgment. But if the foreign court possesses a seal, it must be used for the purpose of authenticating its judgment, even although it is so much worn as no longer to make a legible impression.[151] If the seal is used, there is no need of proof that the exemplification was compared with the original papers filed or the roll.[152] In an action in Canada, on a judgment recovered in the tenth judicial district of California, the plaintiff put in evidence an exemplification under a seal which purported by the impress to be that of the fourteenth district, and the certificate of the clerk of the court verifying it was stated to be under the seal of his office, not the seal of the court. It was held that the proof was insufficient.[153] Where a foreign judgment was authenticated by the signature of a person describing himself as "Secretary of State of Foreign Affairs," with the addition of a private seal, it was held not admissible.[154] But on the other hand, a copy of a judgment rendered in a Cuban court was received in evidence in New York, upon proof that it was signed by the clerk of the court, that the court possessed no seal, that the seal used was that of the Royal College of Notaries, that the clerk's signature validated all the proceedings of the court, and that this was the usual method of authenticating records intended to be sent abroad.[155] In Vermont, at an early day, it was said that "exemplifications of the record of judicial proceedings in a foreign country must be considered prima facie as

[150] Lazier v. Westcott, 26 N. Y. 146, 82 Am. Dec. 404; Capling v. Herman, 17 Mich. 524; 1 Greenl. Ev. §§ 514, 515. See Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661.

[151] Cavan v. Stewart, 1 Starkie, 525.

[152] Warrener v. Kingsmill, 7 U. C. Q. B. 409.

[153] Junkin v. Davis, 22 U. C. Q. B. 369.

[154] Church v. Hubbart, 2 Cranch, 187, 2 L. Ed. 249.

[155] Packard v. Hill, 7 Cow. (N. Y.) 434.

correct; if incorrect, the onus probandi lies on the opposite party." [156] A plea of nul tiel record to an action on a foreign judgment is bad. "The declaration would have been good without the traversed allegation ['as appears by the record'], and the plea does not amount to a denial of the judgment having been recovered, but only to a denial of the existence of such evidence of it." [157] Where an action is brought upon a foreign judgment, parol evidence is competent to show what matters were submitted to and passed upon by the court in ordering such judgment.[158] It has been held a sufficient allegation of the competency of the foreign court which rendered the judgment to set forth that it was "a lawfully constituted court of record, having jurisdiction of all civil matters" within a certain defined territory.[159] And in Connecticut, it is said that, as the proper averment in a complaint on a judgment rendered by a foreign court is that such court, "in an action therein pending between plaintiff and defendant, duly adjudged that defendant should pay to plaintiff" a certain sum, it is not necessary to allege that said court had jurisdiction of the subject-matter, nor that defendant was summoned to appear, nor that a trial was had.[160] The construction and effect of the record of a judgment rendered in a foreign country against the defendant, and on which the plaintiff sues, is a matter of law for the court.[161]

§ 850. Plea of Statute of Limitations.

It is well settled that the statute of limitations of the country of the forum may be pleaded in bar of an action on a foreign judgment.[162] This follows necessarily from the doctrine that such judgments are not records. For if they possess no higher character than

[156] Woodbridge v. Austin, 2 Tyler, 364, 4 Am. Dec. 740.

[157] Philpott v. Adams, 7 Hurl. & N. 888.

[158] Schulenburg v. Merchants' Bank of Canada, 48 Mich. 102, 11 N. W. 826.

[159] Ritchie v. McMullen, 159 U. S. 235, 16 Sup. Ct. 171, 40 L. Ed. 133.

[160] Fisher v. Fielding, 67 Conn. 92, 34 Atl. 714, 32 L. R. A. 236, 52 Am. St. Rep. 270.

[161] Christian & Craft Grocery Co. v. Coleman, 125 Ala. 158, 27 South. 786.

[162] Don v. Lippmann, 5 Clark & F. 1; McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177: North v. Fisher, 6 Ont. 206; Dupleix v. De Roven, 2 Vern. 540; Ang. Lim. § 83.

simple contract debts, it is obvious that they must be barred by the same period of limitations, which is that of the lex fori.

§ 851. Judgments of Foreign Courts of Inferior Jurisdiction.

The question of the effect to be given to a judgment of a foreign court of inferior jurisdiction arose in the case of Forbes v. Scannell,[163] where it concerned an adjudication made by a United States consul in China. The decision was held to be not conclusive. "We are not aware," said the court, "that the rule which accords the force of definitive exposition of the local law to the decisions and judgments of the courts of the local jurisdiction has ever extended so far as to give that sanction to the judgment of a subordinate tribunal of the municipality or territory. The decision of the consul is doubtless entitled to some weight; but we are not prepared to hold it as conclusive of the general question adjudicated by him." And in a case in Illinois, it was held that the record of a judgment of a foreign court, not of record, and of inferior territorial jurisdiction, was not admissible in evidence, in the absence of proof of facts showing that the court had jurisdiction.[164]

§ 852. Foreign Garnishment Proceedings.

The judgment of a foreign court of competent jurisdiction, in a proceeding in the nature of a garnishment, is binding and conclusive, and affords a complete protection to the garnishee, and the money paid under it cannot be recovered back by the original owner of the debt in any action in another country.[165]

[163] 13 Cal. 242.

[164] Kopperl v. Nagy, 37 Ill. App. 23.

[165] Gould v. Webb, 4 El. & Bl. 933; Le Chevelier v. Lynch, 1 Doug. 170; Messier v. Amery, 1 Yeates (Pa.) 533, 1 Am. Dec. 316; Barrow v. West, 23 Pick. (Mass.) 270; Holmes v. Remsen, 20 Johns. (N. Y.) 229, 11 Am. Dec. 269.

CHAPTER XXII.

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PART I. CONCLUSIVENESS AND EFFECT.

§ 853. Before the Constitution.

For a long period in the history of our jurisprudence, judgments rendered in one of the states, when sought to be established or enforced in the courts of another state, were received with a much higher measure of respect, and were allowed a much greater degree of force and conclusiveness, than was accorded to judgments coming from foreign countries. Recent decisions, by elevating the rank of foreign judgments, in respect to their conclusive operation and their

protection against collateral impeachment, have strongly tended to do away with this distinction. But it cannot yet be said to be entirely obliterated. And it was due—and so far as it still subsists, it is still due—solely to the provisions of the federal constitution and the legislation of congress, regulating the interstate effect of public acts, records, and judicial proceedings. Without the aid thus derived from constitutional and statutory provisions, the judgments and decrees of each state would be regarded as foreign judgments in the courts of every other state, and their effect would have to be determined by the principles of international law, by the preponderance of judicial opinion, or by such other considerations as are influential in fixing the status of judicial records brought from foreign lands.[1] "Prior to the adoption of the confederation and the constitution of the United States, the several states were considered entirely independent of each other, and the judgments recovered in their respective courts were foreign judgments in every respect, as in any separate and independent government; and whatever changes now exist in this respect must be sought for in the constitution and laws of the United States."[2] During the colonial period, the proper effect to be given to foreign judgments was so far from being settled that the English courts were pronouncing the most diverse and inconsistent opinions on the subject. The necessity of obviating this confusion in respect to the judgments of the sister states, and the wisdom and policy of giving them a higher standing than had yet been reached by purely foreign judgments, were early foreseen. "When our revolution began, and independence was declared, and the confederation was being formed, it was seen by the wise men of that day that the powers necessary to be given to the confederacy, and the rights to be given to the citizens of each state, in all the states, would produce such intimate relations between the states

[1] Buckner v. Finley, 2 Pet. 586, 7 L. Ed. 528; Thurber v. Blackbourne, 1 N. H. 242; Taylor v. Barron, 30 N. H. 78, 64 Am. Dec. 281; Eastern Townships Bank v. Beebe, 53 Vt. 177, 38 Am. Rep. 665; Smith v. Lathrop, 44 Pa. 326, 84 Am. Dec. 448; Seevers v. Clement, 28 Md. 426; Dorsey v. Maury, 10 Smedes & M. (Miss.) 298; Pennywit v. Foote, 27 Ohio St. 600, 615, 22 Am. Rep. 340; Bonesteel v. Todd, 9 Mich. 371, 376, 80 Am. Dec. 90.

[2] Warren Manuf'g Co. v. Ætna Ins. Co., 2 Paine, 501, 507, Fed. Cas. No. 17,266, per Thompson, J.

and persons that the former would no longer be foreign to each other in the sense that they had been, as dependent provinces; and that, for the prosecution of rights in courts, it was proper to put an end to the uncertainty upon the subject of the effect of judgments obtained in the different states. Accordingly, in the articles of confederation, there was this clause: 'Full faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistrates of every other state.' "[3] Under this clause, in 1784, the court in South Carolina refused to inquire into the merits of a sentence of an admiralty court in North Carolina, in a prize case, both because it was an international court acting in rem, and because the articles of confederation required that due faith and credit should be given to all its proceedings.[4]

§ 854. Constitutional and Statutory Provisions.

When the present constitution was framed, the language of the corresponding clause in the articles of confederation was adopted with some modifications. It is provided that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."[5] In pursuance of the authority thus given, congress soon passed an act couched in the following terms: "That the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken."[6] A sub-

[3] McElmoyle v. Cohen, 13 Pet. 312, 325, 10 L. Ed. 177, per Wayne, J.
[4] Jenkins v. Putnam, 1 Bay, 8, 1 Am. Dec. 594.
[5] Const. U. S. art. 4, § 1.
[6] Act May 26, 1790 (1 Stat. 122); U. S. Rev. St. § 905.

sequent statute extended the provisions of this act to the "territories of the United States and the countries subject to the jurisdiction of the United States."[7]

§ 855. Early Cases on the Subject.

Soon after the promulgation of these provisions of the constitution and laws of the United States, there arose a great diversity of judicial opinion as to their proper construction. The conflicting views on the subject are thus stated by Shaw, C. J.:[8] "By some it was contended that congress did intend to declare, not only what should be deemed conclusive proof of records of the judgments of one state in the courts of another, but their legal effect. They considered that the effect of this law was to put them in all respects on the same footing as domestic judgments, so that to an action of debt on such a judgment no plea would be admissible but that which denied the existence of the judgment, and nothing was put in issue but that fact, and that to be tried by the court by an inspection of the transcript of the record, authenticated in the manner required by the act of congress.[9] By others it was held that the act did nothing more than declare that the record of a judgment of another state, thus authenticated, should be conclusive evidence that such a judgment was passed by a court of such state; of the parties between whom, the nature of the action, and the other facts expressly stated in it; leaving the effect of such judgment to be ascertained by the rules of the common law. At common law, it seemed to be well understood that the legal effect of such foreign judgment was this: that it was prima facie evidence of debt, for which an action of debt, or indebitatus assumpsit as upon an implied promise, would lie; but like other prima facie evidence it might be controlled by proof showing that the judgment was irregular or erroneous, that the defendant had no opportunity to defend, or was not summoned, or that he had good ground of defense, or in short, by proof tend-

[7] Act March 27, 1804 (2 Stat. 298).

[8] In Gleason v. Dodd, 4 Metc. (Mass.) 333.

[9] Citing Noble v. Gold, 1 Mass. 410, note. See, also, Armstrong v. Carson, 2 Dall. 302, Fed. Cas. No. 543; Rogers v. Coleman, Hardin (Ky.) 418, 3 Am. Dec. 733.

ing to outweigh the evidence arising from such judgment." One of the earliest cases holding the latter view was that of Bartlet v. Knight,[10] wherein Sewell, J., was of opinion that the constitutional and statutory provisions were confined to the sole purpose of directing the mode of authenticating records from one state to another, but did not prescribe their effect when so authenticated; while Sedgwick, J., thought that the statute meant that "they shall be incontrovertible and conclusive evidence of their own existence and of all the facts expressed in them. The act, however, stops short of declaring what shall be their effect." Similar rulings were made at an early day in the state of New York.[11] In Tennessee, it was said that a judgment was only prima facie evidence in another state, but if it appeared that it was rendered on a fair and full trial, a court of equity in the latter state would not disturb it.[12] In an early case in South Carolina it was held that nul tiel record could not be pleaded to an action of debt on a judgment recovered in another state; that the provision in the constitution had not invested congress with authority to change the character or enlarge the effect of the judgment, which was still to be regarded as a foreign judgment; and therefore the proper plea was nil debet.[13]

§ 856. Mills v. Duryee, and Later Decisions.

It was not long before the federal supreme court was called upon to put an authoritative construction upon the constitutional and statutory provisions governing the subject. In 1813 was decided the celebrated case of Mills v. Duryee.[14] The action being brought in a court of the District of Columbia, upon a judgment recovered in New York, the defendant pleaded nil debet, to which plea, it was

[10] 1 Mass. 401, 2 Am. Dec. 36.

[11] Hitchcock v. Aicken, 1 Caines, 460. In Taylor v. Bryden, 8 Johns. 173, Kent, C. J., while holding to the doctrine of the case just cited, ruled that a judgment obtained in another state was at least prima facie evidence of a just debt, and that it was incumbent on the defendant to impeach the justice of it, or to show by positive proof that it was irregularly and unduly obtained.

[12] Winchester v. Evans, Cooke, 420.

[13] Hammon v. Smith (1802) 1 Brev. 110.

[14] 7 Cranch, 481, 3 L. Ed. 411.

held, a demurrer was rightly sustained. It was said by Mr. Justice Story, in delivering the opinion of the court: "It is argued that this act provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted. This argument cannot be supported. The act declares that the record, duly authenticated, shall have such faith and credit as it has in the state court from whence it is taken. If in such court it has the faith and credit of evidence of the highest nature, viz., record evidence, it must have the same faith and credit in every other court. Congress have therefore declared the effect of the record by declaring what faith and credit shall be given to it." With particular reference to the matter of the plea, the learned judge remarked: "But it is said that, admitting that the judgment is conclusive, still nil debet was a good plea, and nul tiel record could not be pleaded because the record was of another state, and could not be inspected or transmitted by certiorari. Whatever may be the validity of the plea of nil debet after verdict, it cannot be sustained in this case. The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record, conclusive between the parties, it cannot be denied but by the plea of nul tiel record; and when congress gave the effect of a record to the judgment it gave all the collateral consequences. There is no difficulty in the proof. It may be proved in the manner prescribed by the act, and such proof is of as high a nature as an inspection, by the court, of its own record, or as an exemplification would be in any other court of the same state. Had this judgment been sued in any other court of New York, there is no doubt that nil debet would have been an inadmissible plea. Yet the same objection might be urged, that the record could not be inspected. The law, however, is undoubted that an exemplification would in such case be decisive. The original need not be produced." In conclusion he observed: "Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered prima facie evidence only, this clause in the constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the constitution contemplated a power in congress to give a conclusive effect

to such judgments. And we can perceive no rational interpretation of the act of congress, unless it declare a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision."[15] The rule settled by this decision was not immediately accepted by all the state courts. Three years after its promulgation we find the supreme court of New York still adhering to its former doctrine, that "a judgment in another state is to be considered here as a foreign judgment in every respect, except in the mode of proving it, which is regulated by a statute of the United States. It is only prima facie evidence of a debt, and may be impeached, when attempted to be enforced here, as unjust, or unfair, or irregular."[16] And from the very beginning there was much doubt as to the extent of the rule laid down in Mills v. Duryee. In that same case Mr. Justice Johnson had expressed a dissenting opinion, fearing lest the acceptance of nul tiel record as a plea might at some future time be understood to preclude all inquiry into the jurisdiction of the court rendering the judgment. And indeed it was obvious that if that decision meant that no plea would be admissible under any circumstances, except a denial of the record, it would shut off any investigation of the validity of the judgment as dependent upon jurisdiction. It was in this way that some of the courts at first understood the decision.[17] But it was soon pointed out that the statements in Mills v. Duryee meant no more than that nul tiel record was the only proper form of the general issue in an action on a judgment of another state; that it did not go to the length of excluding such special pleas as a denial of the jurisdiction; and that, in point of fact, the question of jurisdiction was not raised in that case and not pertinent to the decision.[18] And it is on this basis, as we shall presently see, that the question has been finally settled. The leading case is authority for the proposition that a judgment of a sister state is conclusive on the merits; that, for

[15] The doctrine of this case was soon afterwards re-affirmed in Hampton v. McConnel, 3 Wheat. 234, 4 L. Ed. 378.

[16] Pawling v. Willson, 13 Johns. 192.

[17] Commonwealth v. Green, 17 Mass. 515, 546.

[18] Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374; Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151.

purposes of pleading and evidence, it is entitled to the full dignity of a record; and that the defendant is not at liberty, when sued on the judgment, to deny the indebtedness which it ascertains and establishes, or to impeach its justice or deny its obligation. But beyond that the decision does not go. Jurisdictional inquiries are still permissible.

§ 857. Judgment Conclusive on the Merits.

It is now held by all the state courts, following the lead of the federal decisions, that a judgment rendered by a court of competent authority, having jurisdiction of the parties and subject-matter, in one state, is conclusive on the merits in the courts of every other state, when made the basis of an action, and in such action the merits cannot be inquired into.[19] Whatever might have been the dis-

[19] Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411; Hampton v. McConnel. 3 Wheat. 234, 4 L. Ed. 378; McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177; Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475; Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 960; Logansport Gaslight & Coke Co. v. Knowles, 2 Dill. 421, Fed. Cas. No. 8,467. MAINE. Cleaves v. Lord, 43 Me. 290; Sweet v. Brackley, 53 Me. 346. NEW HAMPSHIRE. Taylor v. Barron, 30 N. H. 78, 64 Am. Dec. 281. VERMONT. Hoxie v. Wright, 2 Vt. 269; Blodget v. Jordan, 6 Vt. 580. MASSACHUSETTS. Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; Com. v. Green, 17 Mass. 515; Brainard v. Fowler. 119 Mass. 265. CONNECTICUT. Bank of North America v. Wheeler, 28 Conn. 433, 73 Am. Dec. 683; Appeal of Freeman, 71 Conn. 708, 43 Atl. 185. RHODE ISLAND. Rathbone v. Terry, 1 R. I. 73. NEW YORK. Rocco v. Hackett, 2 Bosw. 579; Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Black v. Black, 4 Bradf. Sur. 174; Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Andrews v. Montgomery, 19 Johns. 162, 10 Am. Dec. 213; Wheeler v. Raymond, 8 Cow. 311; Smith v. Central Trust Co. of New York, 154 N. Y. 333, 48 N. E. 553; Lynde v. Lynde, 162 N. Y. 405, 56 N. E. 979, 48 L. R. A. 679, 76 Am. St. Rep. 332. PENNSYLVANIA. Evans v. Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717; Benton v. Burgot, 10 Serg. & R. 240; Baxley v. Linah, 16 Pa. 241, 55 Am. Dec. 494; Rogers v. Burns, 27 Pa. 525; Wetherill v. Stillman, 65 Pa. 105. NEW JERSEY. Chew v. Brumagim, 21 N. J. Eq. 520; Robert v. Hodges, 16 N. J. Eq. 299; First Nat. Bank of City of Brooklyn v. Wallis, 59 N. J. Law, 46, 34 Atl. 983. DELAWARE. Pritchett v. Clark, 5 Har. 63. MARYLAND. Wernwag v. Pawling, 5 Gill & J. 500, 25 Am. Dec. 317; Duvall v. Fearson, 18 Md. 502; Zimmerman v. Helser, 32 Md. 274. VIRGINIA. De Ende v. Wilkinson's Adm'r, 2 Pat. & H. 663. WEST VIRGINIA. Stewart v. Stewart, 27 W. Va. 167; Sayre's Adm'r v. Harpold, 33 W. Va. 553, 11 S. E. 16. NORTH CAROLINA. Walton v. Sugg, 61 N. C.

position of the state courts, if left to settle this question for themselves, they have uniformly considered that they were bound to adopt the conclusions of the supreme federal tribunal upon the subject. As observed by the court in Massachusetts: "Upon all questions which involve the construction of the constitution of the United States, the supreme court of the United States is the only rightful ultimate tribunal, and its decisions on those questions cannot be withstood or disregarded by state courts, without a dereliction of duty and a violation of the cardinal principles of the federal govern-

98. 93 Am. Dec. 580; McLure v. Benceni, 37 N. C. 513, 40 Am. Dec. 437; Edwards v. Jones, 113 N. C. 453, 18 S. E. 500. SOUTH CAROLINA. Napier v. Gidiere, 1 Speers, Eq. 215, 40 Am. Dec. 613. GEORGIA. McCauley v. Hargroves, 48 Ga. 50, 15 Am. Rep. 660; Powell v. Davis, 60 Ga. 70. FLORIDA. Braswell v. Downs, 11 Fla. 62; Sammis v. Wightman, 31 Fla. 10, 12 South. 526. ALABAMA. Green v. Foley, 2 Stew. & P. 441; Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Crawford v. Simonton's Ex'rs, 7 Port. 110; Bogan v. Hamilton, 90 Ala. 454, 8 South. 186. MISSISSIPPI. Dorsey v. Maury, 10 Smedes & M. 298. LOUISIANA. West Feliciana R. Co. v. Thornton, 12 La. Ann. 736, 68 Am. Dec. 778. TEXAS. Cook v. Thornhill, 13 Tex. 293, 65 Am. Dec. 63. KENTUCKY. Rogers v. Coleman, Hardin, 418, 3 Am. Dec. 733; Delano v. Jopling, 1 Litt. 417; Williams v. Preston, 3 J. J. Marsh. 600, 20 Am. Dec. 179; Fletcher v. Ferrel, 9 Dana, 372, 35 Am. Dec. 143; Rankin v. Barnes, 5 Bush, 20. TENNESSEE. Topp v. Branch Bank of Alabama, 2 Swan, 184; Taylor v. Smith (Tenn. Ch. App.) 36 S. W. 970. KANSAS. French v. Pease, 10 Kan. 51. ARKANSAS. Nunn v. Sturges, 22 Ark. 389. OHIO. Spencer v. Brockway, 1 Ohio, 259, 13 Am. Dec. 615; Goodrich v. Jenkins, 6 Ohio, 43; Pelton v. Platner, 13 Ohio, 209, 42 Am. Dec. 197; Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621. INDIANA. Anderson v. Fry, 6 Ind. 76; Union Sav. Bank & Trust Co. v. Indianapolis Lounge Co., 20 Ind. App. 325, 47 N. E. 846. ILLINOIS. Welch v. Sykes, 3 Gilman, 197, 44 Am. Dec. 689; Bimeler v. Dawson, 4 Scam. 536, 39 Am. Dec. 430; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Smith v. Smith, 17 Ill. 482; Belton v. Fisher, 44 Ill. 32; Zepp v. Hager, 70 Ill. 223. IOWA. State v. Helmer, 21 Iowa, 370. MISSOURI. Destrehan v. Scudder, 11 Mo. 484; Barney v. White, 46 Mo. 137; Hays v. Merkle, 70 Mo. App. 509; Winham v. Kline, 77 Mo. App. 36. MICHIGAN. Wilcox v. Kassick, 2 Mich. 165. WISCONSIN. Kellam v. Toms, 38 Wis. 592. MINNESOTA. Cone v. Hooper, 18 Minn. 351 (Gil. 476). CALIFORNIA. Weir v. Vail, 65 Cal. 466, 4 Pac. 422; Lewis v. Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423. OREGON. Swift v. Stark, 2 Or. 97, 88 Am. Dec. 463. NEVADA. Phelps v. Duffy, 11 Nev. 80. NEBRASKA. Eaton v. Hasty, 6 Neb. 419, 29 Am. Rep. 365; Creighton v. Murphy, 8 Neb. 349, 1 N. W. 138; Packer v. Thompson, 25 Neb. 688, 41 N. W. 650; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306; Commonwealth Mut. Fire Ins. Co. v. Hayden, 61 Neb. 554, 85 N. W. 443.

ment." [20] Accordingly, the courts of one state, when called upon to recognize and enforce a judgment from another state, must "admit not only that there is a record, and that it is what it purports to be, but also that it is just, that the money awarded to the plaintiff is legally due, and that he has a right to recover it without a re-investigation of his claim." [21]

§ 858. Chancery Decrees Equally Conclusive.

The rule that a judgment of a competent court in a sister state is conclusive on the merits extends equally to decrees in chancery.[22] Thus, where a court of equity of another state, having jurisdiction of the parties, has made a decree declaring a certain judgment to be void for fraud and enjoining the execution of it, such decree is binding and conclusive on the parties in every other state; not indeed as being an injunction (for in that aspect it could have no extra-territorial force, nor affect courts out of the jurisdiction), but as being the regular judgment of a court of a sister state, and therefore entitled to full faith and credit in all courts.[23]

§ 859. "Full Faith and Credit" to be Given.

The constitution requires that "full faith and credit" shall be given in each state to the records and judicial proceedings of every other state. Under this language, the status of a judgment rendered in one state and carried into another is peculiar. It is not in all respects a foreign judgment. For, as a matter of pleading and evidence, it is regarded as a record and conclusive. But neither is it in all respects a domestic judgment. For it is not a proper foundation for final process in the latter state, and besides, it may there be impeached for want of jurisdiction.[24] The true doctrine is, that such a judgment is to receive in all courts the same faith, credit, and respect

[20] Brigham v. Henderson, 1 Cush. 430, 48 Am. Dec. 610.

[21] Spencer v. Brockway, 1 Ohio, 259, 13 Am. Dec. 615.

[22] Nations v. Johnson, 24 How. 195, 16 L. Ed. 628; Hunt v. Lyle, 8 Yerg. (Tenn.) 142; Slack v. Perrine, 9 App. D. C. 128.

[23] Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152.

[24] Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475; Haggerty v. Amory, 7 Allen (Mass.) 458.

that is accorded to it at home.[25] It was recently held by the supreme court of New Hampshire that a judgment rendered in another state, and valid by the laws of such state, is not valid in New Hampshire unless it would have been valid if rendered in the last-named state and subject to the laws thereof. In other words, that the validity of a judgment from a sister state is to be tested by the laws of the state where it is put in suit, and tried by the same rules that would apply to a domestic judgment.[26] But, obviously, this is exactly the wrong view. The judgment, if valid at home, is valid everywhere else. It is to have the same force and validity which it has in the state where rendered, not the degree of validity which it would have under the laws of the foreign state. And in fact the decision referred to was reversed by the United States supreme court, in an opinion which holds the views last expressed.[27] The true note was struck in another recent case, where it was said that a judgment rendered and entered in Pennsylvania, in accordance with the laws of that state, and valid there, may be valid and enforceable in Kansas, although a judgment rendered and entered in the same manner and form, and under like circumstances, in Kansas, would be utterly void.[28] On this principle it is held that, in a suit on a judgment recovered in a sister state, the defendant cannot assail its foundation by showing that the cause of action set forth in the complaint in the original

[25] Van Norman v. Gordon, 172 Mass. 576, 53 N. E. 267, 44 L. R. A. 840, 70 Am. St. Rep. 304; Wells-Stone Mercantile Co. v. Truax, 44 W. Va. 531, 29 S. E. 1006; Calloway v. Glenn (Ky.) 49 S. W. 440; Chicago, R. I. & P. Ry. Co. v. Campbell, 5 Kan. App. 423, 49 Pac. 321; Fred Miller Brewing Co. v. Capital Ins. Co., 111 Iowa, 590, 82 N. W. 1023, 82 Am. St. Rep. 529; Smith v. Kander, 58 Mo. App. 61; Parker v. Stoughton Mill Co., 91 Wis. 174, 64 N. W. 751, 51 Am. St. Rep. 881.

[26] Wilbur v. Abbot, 60 N. H. 40.

[27] Renaud v. Abbott, 116 U. S. 277, 6 Sup. Ct. 1194, 29 L. Ed. 629.

[28] Ritter v. Hoffman, 35 Kan. 215, 10 Pac. 576. But in the same state it is said that it is no bar to an action to recover wages of labor, such wages being exempt by the law of the state, that judgment for such wages had been rendered against defendant, as garnishee of plaintiff, in an action brought in another state, where wages are not exempt. Chicago, R. I. & P. Ry. Co. v. Sturm, 5 Kan. App. 427, 49 Pac. 337. A similar rule is established by statute in Nebraska; and the courts of that state hold that it is not in conflict with the "full faith and credit" clause of the federal constitution. Singer Manuf'g Co. v. Fleming, 39 Neb. 679, 58 N. W. 226, 23 L. R. A. 210, 42 Am. St. Rep. 613.

action was such as could not be sued on in the courts of the state where the judgment is in suit.[29] And so "if it is proved by the law, practice, and usage of the state from whence a transcript of a foreign judgment comes, it is entitled to the faith and credit of a judgment, this court will give it the same force and effect, although it is insufficient to constitute a judgment under our laws and practice."[30] Citizens of one state who authorize a suit to be brought in another state, are personally liable for the costs adjudged against them upon their failure in such suit, although they may never have been in that state, and a judgment therefor may be enforced against them in the state of their residence.[31] A judgment rendered in one state, when sought to be enforced in another, is entitled to conclusive effect, not only against parties, but also against purchasers who bought pending the suit in which such judgment was pronounced, to the same extent as in the first state.[32] On the other hand, a court of equity will enjoin the collection of a judgment rendered by the courts of another state, in a proper case, as well as where rendered by the domestic courts.[33] The decision of a court of one state, in the interpretation and administration of its own laws in respect to property subject thereto and within its jurisdiction, is binding upon the courts of another state.[34] But on the other hand, the constitutional provision now under consideration "does not require that judgments in one state shall be followed by the courts of other states as matter of authority in other similar cases. The constitution does not deal with the question of the effect of such judgments as precedents, nor with the opinions of the courts rendering them. It does not require the courts of one state to follow those of another upon any question, whether upon the construction of local statutes or otherwise. There may, it is true, be cases in which a state law or decision has entered into and become a part of a contract in such a way as that a change of the law or a reversal of the decision would impair its obligation, but in those cases the federal question would arise under a different

[29] Phillips v. Godfrey, 7 Bosw. (N. Y.) 150.
[30] Clemmer v. Cooper, 24 Iowa, 185, 95 Am. Dec. 720.
[31] Walton v. Sugg, 61 N. C. 98, 93 Am. Dec. 580.
[32] Fletcher v. Ferrel, 9 Dana (Ky.) 372, 35 Am. Dec. 143.
[33] Stanton v. Embry, 46 Conn. 65.
[34] Haywood v. Daves, 81 N. C. 8.

provision of the constitution. The duty of the courts of one state to follow those of another, upon questions arising upon the construction of statutes of the latter, is a duty resting alone upon comity, and not one imposed by the federal constitution." [35]

§ 860. Validity and Effect how Ascertained.

We have seen that the constitutional clause under discussion means that the judgment must have the same force and effect, and its validity be tested by the same rules, in a sister state as in the state where rendered. But this force and effect depends upon the laws of the state rendering the judgment. Consequently, in order to give the judgment its due effect, the foreign court must be cognizant of those laws. In case of doubt, if there is no evidence of the law or practice of such state, how shall the question be resolved? According to one line of cases, the courts of one state cannot take judicial notice of the laws of another state; they must be proved as facts; and the rule is, that in the absence of all proof, the court will presume that the laws of a sister state are the same as its own. Hence, in the absence of proof, the laws of the latter state will be applied to the judgment for the purpose of determining its validity and effect, on the assumption that thus it will receive the same degree of efficacy which would be accorded to it at home.[36] But according to another line of authorities, in a case arising under this clause of the constitution, the domestic tribunal should take judicial notice of the local laws of the state from which the record comes; the reason alleged being that their proceedings, in such a case, are subject to review in the supreme court of the United States, and in that court the states are not regarded as foreign, and their individual laws are officially noticed, so that the same rule should obtain, under these circumstances, in the state courts. As remarked by a learned judge: "It would be a very imperfect and discordant administration for the

[35] Wiggins Ferry Co. v. Chicago & A. R. Co. (C. C.) 11 Fed. 381, per McCrary, C. J.

[36] Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; Davis v. Headley, 22 N. J. Eq. 115; Thomas v. Pendleton, 1 S. D. 150, 46 N. W. 180, 36 Am. St. Rep. 726; Pelton v. Platner, 13 Ohio, 209, 42 Am. Dec. 197; Bank of Commerce v. Mayer, 42 La. Ann. 1031, 8 South. 260; People v. Dewey, 23 Misc. Rep. 267, 50 N. Y. Supp. 1013. See Field v. Cain, 9 N. M. 283, 50 Pac. 327.

court of original jurisdiction to adopt one rule of decision, while the court of final resort was governed by another; and hence it follows that in questions of this sort we should take notice of the local laws of a sister state in the same manner the supreme court of the United States would do on a writ of error to our judgment." [37] But it seems that these courts, in so holding, misunderstood the doctrine of the federal supreme court. In the case of Hanley v. Donoghue,[38] it was said by the latter court: "Upon principle, and according to the great preponderance of authority, whenever it becomes necessary for a court of one state, in order to give full faith and credit to a judgment rendered in another state, to ascertain the effect which it has in that state, the laws of that state must be proved like any other matter of fact. The opposing decisions in State of Ohio v. Hinchman, 27 Pa. 479, and Paine v. Schenectady Ins. Co., 11 R. I. 411, are based on the misapprehension that this court, on a writ of error to review a decision of the highest court of one state upon the faith and credit to be allowed to a judgment rendered in another state, always takes notice of the laws of the latter state, and upon the consequent misapplication of the postulate that one rule must prevail in the court of original jurisdiction and in the court of last resort. When exercising an original jurisdiction under the constitution and laws of the United States, this court, as well as every other court of the national government, doubtless takes notice, without proof, of the laws of each of the United States. But in this court, exercising an appellate jurisdiction, whatever was matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here. In the exercise of its general appellate jurisdiction from a lower court of the United States, this court takes judicial notice of the laws of every state of the Union, because those laws are known to the court below as laws alone, needing no averment or proof. But on a writ of error to the highest court of a state, in which the revisory power of this

[37] State of Ohio v. Hinchman, 27 Pa. 479; Paine v. Schenectady Ins. Co., 11 R. I. 411; Rae v. Hulburt, 17 Ill. 572; Butcher v. Bank of Brownsville, 2 Kan. 70, 83 Am. Dec. 446; Carpenter v. Dexter, 8 Wall. 513, 19 L. Ed. 426.

[38] 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535. And see Chicago & A. R. Co. v. Wiggins Ferry Co., 119 U. S. 615, 7 Sup. Ct. 398, 30 L. Ed. 519.

court is limited to determining whether a question of law depending upon the constitution, laws, or treaties of the United States has been erroneously decided by the state court upon the facts before it, while the law of that state, being known to its courts as law, is of course within the judicial knowledge of this court at the hearing on error, yet as, in the state court, the laws of another state are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up." Since this decision of the United States supreme court, some of the state courts, finding the reason for the earlier rule abolished, have adopted the principle that they cannot take judicial notice of the laws of a sister state, even in an action upon a judgment rendered in such other state.[39] But the question of taking such judicial notice (as distinguished from the question of giving to the judgment all the faith and credit it is entitled to) is not a federal question, but entirely one of local law; and hence it is not surprising to find that the courts of some of the states still adhere to the rule that they may, in such circumstances, take official cognizance of the laws of the state from which the judgment comes, notwithstanding the ruling of the federal supreme court.[40]

A third view has sometimes been advanced, viz., that a record from another state, in the absence of any showing as to the local law, should be tested by the rules and principles of the common law.[41] But this has not been supported by any considerable portion of the authorities. A case in North Carolina goes so far as to hold that it is not necessary to show by any extrinsic evidence that the judgment was warranted by the laws of the state in which it was pronounced, for the judgment itself is the highest evidence of that fact.[42]

[39] See Sammis v. Wightman, 31 Fla. 10, 12 South. 526.

[40] See Kopperl v. Nagy, 37 Ill. App. 23; Hull v. Webb, 78 Ill. App. 617; Jones v. Quaker City Mut. Fire Ins. Co., 9 Pa. Dist. R. 213; Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am. St. Rep. 806.

[41] Hinson v. Wall, 20 Ala. 298.

[42] Davidson v. Sharpe, 28 N. C. 14.

§ 861. No Greater Effect to be Given than the Judgment has at Home.

We have seen that a judgment from a sister state is to receive the same faith and credit that it has at home. And consequently, if valid by the laws of the state where it was rendered, it must be accounted valid in the state where it is sought to be enforced, although a judgment pronounced in the latter state in the same form and manner, and under the same circumstances, might there be held void.[43] And it must have the same force and effect which it bears at home, notwithstanding that that be greater than would be accorded to a similar judgment rendered by the domestic courts. But on the other hand, "it is well settled that no greater effect is to be given to it than it would have in the state where it was rendered. It has no higher dignity in any other state than in the one where it was pronounced; and hence if, in the courts of the state where the judgment was rendered, it is inconclusive, or if it is inquirable into there during a particular period or on certain conditions, it will be open to investigation, to the same extent, everywhere else.[44] So if a judgment operates in the state where it was rendered only in rem, it will not elsewhere be enforced in personam. It results conclusively from this principle, or is rather involved in it, that if a judgment, in the state where it is recovered, has not the effect of binding personally the defendants, or any of them, in the suit in which it was rendered, no greater effect will be given to it in any other state where it is endeavored to be enforced. It derives its obligation only from the laws of the state in which it is pronounced."[45] So, where a judgment of another state consists of an entry to the effect that, the cause having been settled, it is discontinued by consent, without costs to either party, evidence may be admitted that the discontinuance was not in-

[43] Ritter v. Hoffman, 35 Kan. 215, 10 Pac. 576.

[44] First Nat. Bank v. Cunningham (C. C.) 48 Fed. 510; Bowersox v. Gitt, 12 Pa. Co. Ct. R. 81; Peet v. Hatcher, 112 Ala. 514, 21 South. 711, 57 Am. St. Rep. 45; McLaren v. Kehler, 23 La. Ann. 80, 8 Am. Rep. 592; Cox v. Von Ahlefeldt, 105 La. 543, 30 South. 175; Babcock v. Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728; Newman v. Greeley State Bank, 92 Ill. App. 638; Brown v. Parker, 28 Wis. 21.

[45] Wood v. Watkinson, 17 Conn. 500, 44 Am. Dec. 562. And see Suydam v. Barber, 18 N. Y. 468, 75 Am. Dec. 254.

tended as a satisfaction of the cause of action, but was the result of a promissory agreement which was never complied with; and this is not denying "full faith and credit" to the judgment.[46] Again, under the laws of Kansas, a judgment against a corporation is not conclusive against a stockholder who was not a party to the action if it was obtained through fraud or collusion, although it can be impeached only for such cause or for want of jurisdiction; hence such a judgment, rendered by a court of Kansas is required to be given the same effect but no greater, in an action against a stockholder in a court of another state.[47]

§ 862. Judgment not Executory in Foreign State.

The clause of the constitution which declares that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," applies only to such records as matters of pleading and evidence; it does not make them in all respects equal to domestic judgments, nor render them executory in another state.[48] Judgments obtained in one state are in another state only contract debts, and they do not per se authorize the issue of final process or the exercise of auxiliary jurisdiction; they do not have the force and operation of domestic judgments except for purposes of evidence.[49] They have no extra-territorial force as judgments, for no court can enforce its process or orders beyond the limits of the state which ordained and established it.[50] Hence the holder of a judgment, desiring to enforce it in another state, must sue upon it in the latter state, as the evidence of a debt, and recover a judgment upon it, which last judgment will be a judgment of the latter state,

[46] Jacobs v. Marks, 182 U. S. 583, 21 Sup. Ct. 865, 45 L. Ed. 1241.

[47] Ball v. Wurrington, 47 C. C. A. 447, 108 Fed. 472.

[48] Claflin v. McDermott (C. C.) 12 Fed. 375; McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177; Joice v. Scales, 18 Ga. 725.

[49] Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; Walser v. Seligman (C. C.) 13 Fed. 415; Cunningham v. Butler, 142 Mass. 47, 6 N. E. 782, 56 Am. Rep. 657; Chew v. Brumagim, 21 N. J. Eq. 520; Bennett v. Bennett (N. J. Err. & App.) 49 Atl. 501; Zimmerman v. Helser, 32 Md. 274; Brigot's Heirs v. Brigot, 49 La. Ann. 1428, 22 South. 641; Dunham v. Dunham, 57 Ill. App. 475; Barney v. White, 46 Mo. 137; Weaver v. Cressman, 21 Neb. 675, 33 N. W. 478.

[50] Elizabethtown Sav. Inst. v. Gerber, 34 N. J. Eq. 130.

and as such will be enforced and executed there.[51] A judgment obtained in one state cannot be the foundation for a creditors' bill in another state.[52] Where certain creditors of a corporation organized under the laws of Missouri, having recovered judgments against it in that state, brought a suit in equity in the United States circuit court for the southern district of New York, against one S., to enforce his liability as the holder of certain shares of unpaid capital stock of the corporation, it was held that the bill would not lie; for the Missouri judgments did not have the force of domestic judgments, outside that state, except for purposes of evidence, and would not authorize the exercise of auxiliary jurisdiction.[53] In an action on a judgment rendered in another state, on which an execution has there been returned satisfied in part only, the plaintiff can recover no more than the sum for which it was returned unsatisfied, although damages have been recovered against the officer who served it, for seizing and selling thereon property not liable thereto, the avails of which sale were included in the sum for which he returned it satisfied, and although by the law of the state in which the judgment was rendered, the plaintiff might for such cause obtain a new execution on scire facias. "For," said the court, "we cannot issue an execution on a judgment of a court of another state or country." [54] But a foreign judgment is at all events a debt, for the recovery of which the creditor is entitled to all the remedies applicable to other debts. Hence it is not necessary to bring an action at law upon such a judgment before instituting a chancery suit to avoid a fraudulent conveyance by the debtor.[55]

[51] Claflin v. McDermott (C. C.) 12 Fed. 375; First Nat. Bank v. Duel County (C. C.) 74 Fed. 373; Wilmer v. Lewis, 24 Pa. Co. Ct. R. 613; Lamberton v. Grant, 94 Me. 508, 48 Atl. 127, 80 Am. St. Rep. 415; Turley v. Dreyfus, 35 La. Ann. 510; Weaver v. Cressman, 21 Neb. 675, 33 N. W. 478; Carter v. Bennett, 6 Fla. 214.

[52] Claflin v. McDermott (C. C.) 12 Fed. 375.

[53] Walser v Seligman, 13 Fed. 415.

[54] Arnold v. Roraback, 8 Allen (Mass.) 429.

[55] Watkins v. Wortman, 19 W. Va. 78.

§ 863. Rank and Priority.

Judgments of one state, when sought to be enforced in another, "enjoy not the right of priority, or privilege, or lien, which they have in the state where they are pronounced, but that only which the lex fori gives to them by its own laws in their character of foreign judgments." [56] Consequently, there is nothing in the constitution or laws of the United States to prevent a state from giving a preference to its own judgments over the judgments of sister states; in allowing demands against the estates of decedents. And accordingly, in several of the states, such judgments have only the effect and rank of simple contract debts, and they are not put into the preferred class with domestic judgments.[57]

§ 864. Original Cause of Action Merged.

As between the several states of the American Union (contrary to the rule in regard to judgments from foreign countries), it is well settled that the recovery of a judgment in one state, in a court having jurisdiction, merges the original cause of action, so that it cannot thereafter form the basis of a fresh suit in another state.[58] And

[56] Story, Confl. Laws, § 609, citing McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177.

[57] Harness v. Green's Adm'r, 20 Mo. 316; Brengle v. McClellan, 7 Gill & J. (Md.) 434. See. also, Cameron v. Wurtz's Adm'r, 4 McCord (S. C.) 278.

[58] Cleaves v. Lord, 43 Me. 290; President, etc., of North Bank v. Brown, 50 Me. 214, 79 Am. Dec. 609; Child v. Eureka Powder Works, 45 N. H. 547; McGilvray v. Avery, 30 Vt. 538; Green v. Starr, 52 Vt. 426; Harrington v. Harrington, 154 Mass. 517, 28 N. E. 903; Hatch v. Spofford, 22 Conn. 485, 58 Am. Dec. 433; Merritt v. Fowler, 76 Hun, 424, 27 N. Y. Supp. 1047; Gray v. Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 720; Baxley v. Linah, 16 Pa. 241, 55 Am. Dec. 494; Hogg v Charlton, 25 Pa. 200; President, etc., of Bank of United States v. Merchants' Bank, 7 Gill (Md.) 415; Barnes v. Gibbs, 31 N. J. Law, 317, 86 Am. Dec. 210. Compare Beall's Adm'r v. Taylor's Adm'r, 2 Grat. (Va.) 532, 44 Am. Dec. 398; Davis v. Morris' Ex'rs, 76 Va. 21. Under the statute in New York which provides that a recovery of judgment in a foreign state for the price or value of property obtained by fraud or deceit does not affect plaintiff's right to arrest defendant, an action may be maintained in New York on the original cause of action, though a judgment has been recovered thereon in another state. Pitt v. Freed, 78 Hun, 614, 28 N. Y. Supp. 863.

so, where the plaintiff, after commencing an action in one state, sues the defendant on the same claim in another state and obtains a valid judgment against him, that judgment will constitute a bar to the further prosecution of the action first begun. For, as the foreign judgment is entitled to the same credit as a domestic one, the plaintiff would have two judgments against the same defendant for the same cause of action.[59] But if the judgment is not ex-territorially valid for want of jurisdiction,—as where it has been obtained against a non-resident without service upon him or appearance,—such judgment, if unsatisfied, will constitute no bar to a subsequent action against him in the state of his domicile on the original demand.[60] But a judgment thus recovered in another state and partially satisfied will bar a recovery upon the original demand to the extent of the sum paid in such partial satisfaction, but no further.[61] And where joint debtors reside in different states, they may be sued separately, in the respective states having jurisdiction of their respective persons or property, and a judgment in such case against one in one state, is no bar to a recovery against the others, in another state.[62] A report of a commissioner of insolvency in one state, in favor of an administrator there, accepted and recorded by the probate court to which it is returned, and acquiesced in by the parties, is such a judgment that the same person as administrator in another state may plead it in bar to a suit by the same claimant upon the same cause of action.[63] Where a suit is brought in one state upon the same cause of action on which judgment has been recovered in another state, and such judgment is pleaded in bar to a recovery in the second suit, it is no sufficient answer to such plea to allege that a motion was filed by the defendant in the court in which

[59] President, etc., of North Bank v. Brown, 50 Me. 214, 79 Am. Dec. 609; Whiting v. Burger, 78 Me. 287, 4 Atl. 694; Child v. Eureka Powder Works, 45 N. H. 547; Rogers v. Odell, 39 N. H. 452; Bank of North America v. Wheeler, 28 Conn. 433, 73 Am. Dec. 683; Graef v. Bernard, 162 Mass. 300, 38 N. E. 503; Paine v. Schenectady Ins. Co., 11 R. I. 411; Union Pac. Ry. Co. v. Baker, 5 Kan. App. 253, 47 Pac. 563.

[60] Whittier v. Wendell, 7 N. H. 257; Fitzsimmons v. Marks, 66 Barb. (N. Y.) 333.

[61] Rangely v. Webster, 11 N. H. 299.

[62] Brown v. Birdsall, 29 Barb. (N. Y.) 549.

[63] Lomas v. Hilliard, 60 N. H. 148.

the judgment was rendered to set the same aside, on the ground that he was not indebted to the plaintiff and that he had not been served with process, and that, for the purpose of pleading the said judgment in bar in the second suit, the defendant fraudulently consented to have the said motion overruled.[64] It has been held that where a judgment has been recovered in a court of competent jurisdiction in one state, upon a judgment previously recovered in another state, the latter judgment is merged in the former, all of its liens or priorities upon lands in the state of its rendition are abandoned, and the owner of such lands may enjoin a sale of the same upon an execution issued upon the original judgment.[65] But this view has been denied.[66] And indeed, as pointed out by Mr. Bigelow,[67] "it may be inconvenient that two judgments should subsist in the same state against the same person on the same demand; but no such inconvenience can exist in the case of judgments rendered in different states, and there is no sufficient reason for the application of the purely technical doctrine of merger, subversive of substantial justice as it would be in such cases."

§ 865. Lis Pendens in Another State no Bar.

It is well settled, upon the authorities, that the pendency of a suit in one state cannot be pleaded in bar or abatement of a second action in another state between the same parties and for the same cause of action; nothing but a definitive judgment on the merits, merging the demand, can produce that result.[68] "The pendency of

[64] Harryman v. Roberts, 52 Md. 64.

[65] Gould v. Hayden, 63 Ind. 443.

[66] Weeks v. Pearson, 5 N. H. 324; Wells v. Schuster-Hax Nat. Bank, 23 Colo. 534, 48 Pac. 809.

[67] Note to Story, Confl. Laws (8th Ed.) § 599a.

[68] White v. Whitman, 1 Curt. 494, Fed. Cas. No. 17,561; McGilvray v. Avery, 30 Vt. 538; Goodall v. Marshall, 11 N. H. 99, 35 Am. Dec. 472; Newell v. Newton, 10 Pick. (Mass.) 470; Hatch v. Spoffard, 22 Conn. 485, 58 Am. Dec. 433; Cook v. Litchfield, 5 Sandf. (N. Y.) 342; Bowne v. Joy, 9 Johns. (N. Y.) 221; Walsh v. Durkin, 12 Johns. (N. Y.) 99; Smith v. Lathrop, 44 Pa. 326, 84 Am. Dec. 448; Seevers v. Clement, 28 Md. 434; Cole v. Flitcraft, 47 Md. 312; Drake v. Brander, 8 Tex. 352; Caledonia Ins. Co. v. Wenar (Tex. Civ. App.) 34 S. W. 385; Salmon v. Wootton, 9 Dana (Ky.) 422; Grider v. Apperson, 32 Ark. 332; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Wilcox v. Kassick, 2 Mich. 165. Compare Earl v. Raymond, 4 McLean, 233, Fed. Cas. No. 4,243.

a prior suit in a foreign country cannot be pleaded in abatement of a suit for the same cause here, and it has been held that the states of the American Union stand in the relation of foreign states as regards this particular matter." [69] And a fortiori it is clear that the commencement of another suit for the same cause of action in a court of another state, since the last continuance, cannot be pleaded in abatement of the original suit. "A subsequent suit may be abated by an allegation of the pendency of a prior suit, but the converse of the proposition is, in personal actions, never true." [70] The general rule, however, according to Lowell, J., "is modified by courts of equity and admiralty, who will require a plaintiff who has a suit pending elsewhere for the same cause, and with an equally advantageous remedy, to elect which he will prosecute." "I am much inclined to think," says the same learned judge, "that courts of law will hereafter hold that they may attain the same end through their power of postponing actions and suspending judgments." [71]

It has been broadly stated that the pendency of a suit in a state court does not generally prevent even the same suitor from seeking a remedy in a federal court.[72] And indeed both reason and authority support the view that the pendency of an action in a federal circuit court for a district outside the state in whose courts another action for the same cause is brought, between the same parties, cannot be pleaded in abatement of such second suit.[73] But on the other hand, it seems that such a plea is good if the federal court, having jurisdiction of the case, is in a district within the limits of the state where the second action is commenced.[74]

§ 866. Judgment for Defendant as a Defense.

If a plaintiff is defeated in a trial on the merits in an action in one state, he cannot afterwards maintain a suit on the same cause

[69] Lowry v. Hall, 2 Watts & S. (Pa.) 129, 38 Am. Dec. 495.
[70] Benner v. Marshall, 1 Wheat. 215, 4 L. Ed. 74.
[71] Lynch v. Hartford Fire Ins. Co. (C. C.) 17 Fed. 627.
[72] Hurst v. Everett (C. C.) 21 Fed. 218. And, see infra, § 939a.
[73] Walsh v. Durkin, 12 Johns. (N. Y.) 99; Cook v. Litchfield, 5 Sandf. (N. Y.) 330. And see White v. Whitman, 1 Curt. 494, Fed. Cas. No. 17,561.
[74] Smith v. Atlantic Mut. Fire Ins. Co., 22 N. H. 21.

of action against the same defendant in any other state.[75] Hence where it appears at the trial that in a former suit between the same parties in a sister state, the plaintiffs might have insisted upon their right to recover, on every ground upon which they rely in the second suit, and the same proof offered in the second suit was properly introduced and considered, upon the merits, in the former suit, and judgment rendered for the defendant, such judgment will be a bar to the second suit.[76] Upon the same principle, a decree in equity dismissing the bill, rendered by a competent court having jurisdiction of the parties and subject-matter, is a bar to a subsequent suit in equity in another state, by the same complainant on the same state of facts.[77] A judgment against the plaintiff in one state on a demurrer to a plea of the statute of limitations, is a bar to a suit on the same cause of action in another state.[78] The judgment of a court of one of the states, that the plaintiff's action on a note was barred by the laws of another state, is a bar to an action on the same note in the latter state.[79]

PART II. SISTER STATE JUDGMENT AS A CAUSE OF ACTION.

§ 867. Judgment must be Valid, Subsisting, and Final.

The question of the validity and conclusiveness of judgments of another state most commonly comes before the courts in the case of suits upon such judgments, prosecuted for the purpose of making them executory in the jurisdiction where the defendant or his property is found. We are therefore next to consider judgments of a sister state as a cause of action. And in the first place, a judgment, to be available for this purpose, must be a valid, subsisting, and final adjudication.[80] It must be capable of enforcement, and fit to serve

[75] Sweet v. Brackley, 53 Me. 346. And see Green v. Sanborn, 150 Mass. 454, 23 N. E. 224.

[76] Baker v. Rand, 13 Barb. (N. Y.) 152.

[77] Low v. Mussey, 41 Vt. 393; Brown v. Lexington & D. R. Co., 13 N. J. Eq. 191.

[78] Fulton Iron Works v. Riggin, 14 Mo. App. 321.

[79] Wernse v. McPike, 100 Mo. 476, 13 S. W. 809.

[80] Burnside v. Burnside, 2 Dauph. Co. Rep. (Pa.) 261. A judgment recovered in another state cannot be made the basis of an action when it has been

as the foundation for final process, in the state where it was rendered. Hence, for example, in an action on a judgment recovered in another state, if the defendant can show a decree granted to him by the same court which rendered the judgment, on its equity side, enjoining the plaintiff from further proceedings on the judgment, this will bar the plaintiff's action.[81] But the courts of Iowa hold that an action may be maintained in that state upon a judgment rendered by a court of record in another state, although it has become dormant under the laws of the latter state.[82] And in an action on a judgment of a sister state, it is not necessary to allege in the declaration that such judgment is "in full force and virtue;" it is sufficient to aver that the amount claimed is due thereon.[83] Further, the judgment is conclusive upon the parties only when it is a

declared void by a court of the same state where it was rendered. McCadden v. Slauson, 96 Tenn. 586, 36 S. W. 378. Nor where, under the laws of that state, it is conclusively presumed to have been paid. Baker v. Stonebraker, 36 Mo. 338. Nor where its operation is suspended, in the state of its rendition, by a stay of execution. Nazro v. McCalmont Oil Co., 36 Hun (N. Y.) 296. And of course a foreign judgment cannot be sued on where it has been reversed, vacated, or set aside in the state where it was rendered; but the mere pendency of an application for a new trial, or for an order setting aside the judgment, will not prevent a suit upon it in another state. Tompkins v. Cooper, 97 Ga. 631, 25 S. E. 247; Lawrence v. Jarvis, 32 Ill. 304. A judgment of one state may be sued on in another state, though none of the parties is a resident of the latter state, if jurisdiction of the person can be obtained. Reed v. Chilson, 142 N. Y. 152, 36 N. E. 884. A judgment for a sum of money, as for alimony, in gross, rendered by a court of Missouri, is a final judgment, though the statute of that state provides that the court, on the application of either party, may make such alteration from time to time as to the allowance of alimony as may be proper, and hence such judgment may be sued on in another state. Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204, 83 Am. St. Rep. 806. In Georgia, it is said that if a deficiency decree for the unpaid balance of the price of land, rendered after sale in foreclosure proceedings, in favor of the vendor against the vendee, is valid under the laws of the state where it was rendered, an action on it may be maintained in the courts of Georgia. Tompkins v. Cooper, 97 Ga. 631, 25 S. E. 247. But compare Smith v. Moore, 53 Mo. App. 525.

[81] Palmer v. Palmer, 2 Miles (Pa.) 373; Bank of Chadron v. Anderson, 6 Wyo. 518, 48 Pac. 197.

[82] David v. Porter, 51 Iowa, 254, 1 N. W. 528. But compare Chapman v. Chapman, 48 Kan. 636, 29 Pac. 1071; St. Louis Type Foundry v. Jackson, 128 Mo. 119, 30 S. W. 521. See Beer v. Simpson, 65 Hun, 17, 19 N. Y. Supp. 578.

[83] Blake v. Burley, 9 Iowa, 592.

definitive judgment upon the same cause of action upon the merits. An interlocutory order upon a special application pending the suit is not conclusive upon a similar application in an action in another state.[84] And the rule of conclusiveness does not apply to a suit dismissed for alleged want of prosecution and never tried on its merits, because, under such circumstances, the cause of action remains unlitigated, and there is in fact no judgment.[85] Again, it seems that if the judgment is in the alternative, no action can be maintained upon it in another state. Thus, an action of debt will not lie in one state upon a judgment rendered in a replevin suit in another state in the following words: "That the plaintiff return said goods to the defendants, and if he fail to do so, that the defendants recover of the plaintiff and his security in the replevin bond the value of the goods as found by the jury." The reason is, that in debt only a money judgment can be given, but the rendition of such a judgment would deprive the defendants of their alternative of returning the goods.[86] Where, under the laws of a given state, a summary judgment without notice is obtained by the sureties on a bond against their principal, such judgment can have no extraterritorial validity so as to authorize a recovery in another state.[87] When action is brought on a judgment rendered by a court of inferior jurisdiction in another state, which was there appealed and passed upon by the supreme court, the record of the latter court, being the final judgment in the cause, is the proper transcript to be presented.[88]

§ 868. Judgments upon Confession.

There is nothing in the character of a judgment entered upon confession without action to prevent it from being available as a cause of action in another state, equally as well as one rendered upon adversary proceedings. If any kind of a judgment,—for in-

[84] Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460.

[85] Rankin v. Barnes, 5 Bush (Ky.) 20.

[86] Thorner v. Batory, 41 Md. 593, 20 Am. Rep. 74.

[87] Sevier v. Roddie, 51 Mo. 580.

[88] McLaren v. Kehler, 23 La. Ann. 80, 8 Am. Rep. 592. See Griggs v. Becker, 87 Wis. 313, 58 N. W. 396. Compare Cougill v. Farmers' & Merchants' Ins. Co., 25 Or. 360, 35 Pac. 975.

stance, one confessed before the prothonotary or clerk of the court in vacation,—is recognized and enforced as a "judicial proceeding" by the laws of the state from which it comes, it will be entitled to full faith and credit in the other states.[89] The sole question must be, what force and effect are accorded to the judgment in the state of its rendition. And to determine this, the court where the judgment is put in suit should inquire into the laws and practice of the state whence it comes.

§ 869. Decrees in Chancery.

It is now the accepted rule in this country that an action may be maintained upon a decree in equity, rendered by a domestic court, which merely adjudges the payment of a definite sum of money.[90] In England the rule is otherwise. But even in that country the courts have always recognized the right to sue upon foreign or colonial decrees, inasmuch as there was no other appropriate method of enforcing their payment.[91] And in the United States we have numerous rulings to the effect that an action of debt will lie in the courts of one state upon a decree for the payment of money rendered by a court of chancery in a sister state.[92] This doctrine, in its application to judgments and decrees rendered in another state, does not appear to be questioned.

[89] Richards v. Barlow, 140 Mass. 218, 6 N. E. 68; Van Norman v. Gordon, 172 Mass. 576, 53 N. E. 267, 44 L. R. A. 840, 70 Am. St. Rep. 304; Trebilcox v. McAlpine, 62 Hun, 317, 17 N. Y. Supp. 221; Teel v. Yost, 128 N. Y. 387, 28 N. E. 353, 13 L. R. A. 796; Coleman v. Waters, 13 W. Va. 278; Ritter v. Hoffman, 35 Kan. 215, 10 Pac. 576; Sipes v. Whitney, 30 Ohio St. 69; Kingman v. Paulson, 126 Ind. 507, 26 N. E. 393, 22 Am. St. Rep. 611; Nicholas v. Farwell, 24 Neb. 180, 38 N. W. 820; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306.

[90] See infra, § 962.

[91] Sadler v. Robbins, 1 Camp. 253.

[92] Moore v. Adie's Adm'r, 18 Ohio, 430; Post v. Neafie, 3 Caines (N. Y.) 22; Dubois v. Dubois, 6 Cow. (N. Y.) 494; Evans v. Tatem, 9 Serg. & R. (Pa.) 252, 11 Am. Dec. 717; Howard v. Howard, 15 Mass. 196; McKim v. Odom, 12 Me. 94; Warren v. McCarthy, 25 Ill. 95; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179.

§ 870. Sentences imposing Penalties.

The federal constitution does not require a state to enforce the penal laws of any other state. Nor do its provisions on the subject of the interstate validity of judgments relate to sentences in criminal cases. The essential nature and real foundation of a cause of action are not changed by recovering a judgment upon it; and the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude the courts of another state, when the judgment is sought to be enforced therein, from ascertaining whether the claim is really of such a nature as those courts are authorized to enforce.[93] Hence, in an action on a foreign judgment, it is proper for the court to go behind the judgment so far as to see whether it is founded on a penal action, or an action relating to the revenue of a foreign jurisdiction; such judgments not being entitled to "faith and credit." [94] Thus, a provision in a state statute, declaring that a person who has been sentenced upon a conviction for a felony shall be incompetent as a witness, does not apply to a conviction had in another state; it has reference only to a conviction in the state enacting the law. It is not required by the constitution that personal disabilities imposed upon a person convicted of crime in one state should follow him and be enforced in other states.[95] But where a state statute provides that if any certificate or notice, given by the officers of certain corporations, shall be false in any material representation, all the officers who have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers, this is not a penal statute, in the sense of international law, so that a judgment recovered thereunder cannot be enforced in another state; and a decision of a court of another state that the judgment is not enforceable therein fails to accord to such judgment the "full faith and credit" required by the constitution of the United States.[96]

[93] Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123.
[94] State of Arkansas v. Bowen, 20 D. C. 291.
[95] Sims v. Sims, 75 N. Y. 466.
[96] Huntington v. Attrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, re-

§ 871. Police Regulations of Another State not Enforced.

One state should not be called upon to enforce the local police regulations of another state. For example, statutes prescribing proceedings to enforce the support of bastard children by their fathers are of this character, and cannot be put in operation beyond the jurisdiction of the state by which they are enacted. But still it is held that where the local jurisdiction has attached, and the courts of the state have taken cognizance and rendered judgment for the penalty prescribed by such a statute, such judgment is entitled to full faith and credit in every other state. And the courts of another state will not inquire into the facts on which it was based, nor whether the cause of action would have been enforced by them.[97] On the same principle, the objection, that one state will not enforce the penal laws of another state, is not well taken where the action is upon a judgment rendered in such other state upon a forfeited recognizance taken for a violation of its penal laws.[98]

§ 872. Judgments affecting Land outside the State.

It is a well settled principle that real or immovable property is governed only by the law of its situs. Only the courts of the state or country within which it lies can have any jurisdiction over it. It cannot be directly affected by the judgment or decree of any foreign court. Nor are these rules abrogated by the constitutional provisions or the legislation of congress upon the interstate effect of judgments. Those provisions were not designed to extend the power and authority of any state over real property within the territory of another. Hence a decree of a court in one state for the sale of lands lying in another state is entirely inoperative to transfer or affect any interest of the owner, either legal or equitable.[99] And it

versing Attrill v. Huntington, 70 Md. 191, 16 Atl. 651, 2 L. R. A. 779. 14 Am. St. Rep. 344.

[97] State of Indiana v. Helmer, 21 Iowa, 370. And see Healy v. Root, 11 Pick. (Mass.) 390.

[98] Spencer v. Brockway, 1 Ohio, 259, 13 Am. Dec. 615. But compare State of Arkansas v. Bowen, 3 App. D. C. 537.

[99] Price v. Johnston, 1 Ohio St. 390.

is beyond the power of a court to make a decree that a deed given for lands in another state is void, and it has no jurisdiction to decree a conveyance or delivery of possession founded on that decree.[100] Nor can the decree of a foreign court avail to determine the validity, or order the foreclosure, of a mortgage on realty situated outside its jurisdiction,[101] or to declare the existence of a lien upon it.[102] So a decree of one state, finding that an exchange of land owned by complainant in that state for land of defendant in another state was obtained by fraud, and directing reconveyances, does not operate, of itself, to divert the title to the land in the latter state from complainant to defendant.[103] And so a decree appointing a receiver for an insolvent corporation, and investing him with title to all its property, has no effect whatever on the title to lands situated in another state, nor does it give the receiver any right to claim such lands as against an attaching creditor.[104] In a case where lands devised were situated in the states of Pennsylvania and Illinois, and the courts of Pennsylvania had construed the will in a suit for the partition of the lands in that state, it was held that the judgment in that suit did not operate as an estoppel in a suit before the Illinois courts for a partition of the Illinois lands, and the Illinois court was

[100] Davis v. Headley, 22 N. J. Eq. 115. Thus, the judgment of a court in New York, declaring that a deed of real estate, conveying land in Tennessee, is void and inoperative as against the plaintiff's claim, is not binding on the courts of the latter state. Carpenter v. Strange, 141 U. S. 87, 11 Sup. Ct. 960, 35 L. Ed. 640. And see Blackman v. Wright, 96 Iowa, 541, 65 N. W. 843.

[101] Pittsburgh & St. L. R. Co.'s Appeal (Pa.) 4 Atl. 385; Lynde v. Columbus, C. & I. C. Ry. Co. (C. C.) 57 Fed. 993. But where judgment is obtained in one state on a note made and payable there, and secured by a mortgage on land in another state, and plaintiff brings suit in the latter state on such judgment, the court in the latter state may thereupon enforce the mortgage lien on the land. Brown v. Todd's Adm'r (Ky.) 29 S. W. 621. And where a mortgage covering lands in two states was given to secure a note, the amount found due on such note in an action brought in the one state to foreclose the mortgage on the property there situate is res judicata in a subsequent suit for foreclosure on the property lying in the other state. Frank v. Snow, 6 Wyo. 42, 42 Pac. 484.

[102] Short v. Galway, 83 Ky. 501, 4 Am. St. Rep. 168. And see McGarvey v. Darnall, 134 Ill. 367, 25 N. E. 1005, 10 L. R. A. 861.

[103] Fryer v. Meyers (Tex. Sup.) 13 S. W. 1025.

[104] City Ins. Co. v. Commercial Bank, 68 Ill. 348.

not bound by the construction of the will adopted by the courts of Pennsylvania, although the testator was domiciled there.[105]

It is indeed a general principle that a judgment rendered in one state construing a will is not conclusive as to the title to land situated in another state, which title depends upon the construction of the will.[106] Thus, a decision by the courts of the domicile of a testator that his will worked a conversion into personalty of all his real property, wherever situated, is not conclusive upon the courts of a sister state in respect to the effect of the will upon the title to real property in the latter state.[107] So, the proceedings of a probate court in Louisiana, adjudicating as to a succession embracing real and personal property of the deceased in that state, and mentioning, but not appraising, claims to real estate in Texas, are not in rem as to the Texas lands, and a finding in such proceedings as to heirship is not res judicata as to such lands.[108]

There is, however, an indirect way in which, in certain cases, the decree of a court of equity may affect the title to land lying in another state. A chancery court in one state, having acquired jurisdiction over the persons of the litigants, may enforce a trust, or the specific performance of a contract, in relation to lands situate in another state. And although the decree in such case, or the deed of a master executed in pursuance thereof, cannot operate to transfer the title to such lands, yet the decree is binding upon the consciences of the parties, and it concludes them in respect to all matters and things properly adjudicated and determined by the court. And when the decree in such case finds and determines the equities of the parties in respect to such land, and directs a conveyance by the parties in accordance with their equities, such decree, although no conveyance has been executed, may be pleaded as a cause of action, or as a ground of defense, in the courts of the state where the land is situated. And it is entitled, in the court where so pleaded, to the force and

[105] McCartney v. Osburn, 118 Ill. 408, 9 N. E. 210.

[106] Cooper v. Hayes, 96 Ind. 386.

[107] Clarke v. Clarke, 178 U. S. 186, 20 Sup. Ct. 873, 44 L. Ed. 1028, affirming Appeal of Clarke, 70 Conn. 195, 39 Atl. 155.

[108] Branch v. Texas Lumber Manuf'g Co., 6 C. C. A. 92, 56 Fed. 707; Clapp's Ex'rs v. Branch, 11 Tex. Civ. App. 203, 32 S. W. 735.

effect of record evidence of the equities therein determined, unless it be impeached for fraud.[109] It is also held that a court of equity, having jurisdiction of the parties, has power to compel the defendant to release and discharge an apparent cloud upon the title to land situated in another state.[110] On the same principle, if a title or power affecting lands in another state was obtained by duress or fraud, a personal decree may be had, upon proper averments, vacating such title or power. Or if such lands have been converted into money, or money has been realized from them, by one acting under a fraudulent title or power, he can be compelled to account, either in law or in equity, as the nature of the accounts or the character of the relief may require.[111]

§ 873. Form of Action on Sister State Judgment.

A judgment of a court of a sister state is entitled, under the constitution and laws of the United States, to all the dignity of a record, in respect to matters of pleading and evidence. Consequently an action of assumpsit will not lie upon such a judgment. The declaration must be in debt, counting upon the judgment as a record.[112] A

[109] Burnley v. Stevenson, 24 Ohio St. 474, 15 Am. Rep. 621; Newton v. Bronson, 13 N. Y. 587, 67 Am. Dec. 89. In another state, it is said that, while a chancery court, after acquiring personal jurisdiction of a party in a proper case, may decree performance of contracts relating to lands lying in another state, yet, if the party fails to convey in obedience to the decree, the decree does not affect the legal title to the lands. Winn v. Strickland, 34 Fla. 610, 16 South. 606. And see Bullock v. Bullock, 52 N. J. Eq. 561, 30 Atl. 676, 27 L. R. A. 213, 46 Am. St. Rep. 528. In Iowa, it was held that a judgment in an action brought in a foreign state to set aside a deed to lands in Iowa did not settle the title to said lands as to defendants living in Iowa who did not appear in said action, where such judgment did not purport to act upon the land, though it ordered a defendant who did appear to execute a deed of such lands to the plaintiff in that action, and enjoined the other defendants from prosecuting an action in Iowa affecting the title to said land, and it appeared that, prior to said action, plaintiff therein had conveyed the lands to his wife. Blackman v. Wright, 96 Iowa, 541, 65 N. W. 843. And see Norton v. House of Mercy, 41 C. C. A. 396, 101 Fed. 382.

[110] Remer v. Mackay (C. C.) 35 Fed. 86.

[111] Rose v. Gibson, 71 Ala. 35.

[112] Boston India Rubber Factory v. Hoit, 14 Vt. 92; Morehead v. Grisham, 13 Ark. 431; Tompkins v. Craig (C. C.) 102 Fed. 69; McKim v. Odom, 12 Me. 94; Smith v. Kander, 58 Mo. App. 61; Belford v. Woodward, 55 Ill. App. 307.

certain early case advanced the opinion that the action might be either debt or assumpsit, but could not be case.[113] But it must be perfectly apparent that the only proper form is debt.

§ 874. Requisites of Declaration.

A complaint declaring on a judgment of another state is sufficient in matter of description when it sets forth the court in which the judgment was rendered, the place where the court was held, the names of the parties, the date of the judgment, and the amount recovered.[114] The record of a judgment of a "court of common pleas" of a county, in another state, in the absence of evidence to the contrary, is to be regarded as a judgment of a court of general jurisdiction, and is entitled to every presumption in favor of its validity and regularity.[115] In regard to the question of how much of the record of the judgment sued on must be set out by the plaintiff in his declaration or in evidence, it has been asked: "May not the plaintiff bring his action upon an incomplete record; as, for instance, upon a transcript of the judgment only, or upon so much of the record as to show only that the court had jurisdiction of the person and matter, and that a judgment was rendered? It is much to be doubted whether the defendant could compel him to produce the remainder of the record or a copy of it. The defendant could plead any of the pleas permitted in such case, and thus perhaps compel the plaintiff to show the rest of the record as a matter of evidence. Thus the defendant could plead nul tiel record; or perhaps that the court had no jurisdiction of the person or matter, or that defendant was not served and did not appear; or that the judgment was obtained by

[113] Garland v. Tucker, 1 Bibb (Ky.) 361.

[114] Andrews v. Flack, 88 Ala. 290, 6 South. 907; Davis v. Lane, 2 Ind. 548, 54 Am. Dec. 458; Fisher v. Fielding, 67 Conn. 91, 34 Atl. 714, 32 L. R. A. 236, 52 Am. St. Rep. 270; Thurmond v. Bank of State of Georgia (Tex. Civ. App.) 27 S. W. 317; Whitley v. General Electric Co., 18 Tex. Civ. App. 674, 45 S. W. 959. In a suit on a judgment of a sister state, it is sufficient to aver that the judgment was duly rendered; it will be presumed that the judgment was valid, until the contrary is shown. Stephens v. Roby, 27 Miss. 744. In an action on a foreign judgment on a note, the note need not be incorporated in the declaration or statement of claim. Hogg v. Charlton, 25 Pa. 200; First Nat. Bank v. Crosby, 179 Pa. 63, 36 Atl. 155.

[115] Pringle v. Woolworth, 90 N. Y. 502.

fraud; and thus he might render it necessary for the plaintiff to produce other parts and even the whole of the record. The plaintiff can by pleading be compelled to show enough to prove a valid judgment recovered, but we cannot see that he can, by motion, be obliged to produce any particular part of the record." [116]

§ 875. Averring Jurisdiction.

It is a well settled rule that, in bringing suit on a judgment rendered by a court of record in another state, it is not necessary for the plaintiff to aver that the court had jurisdiction either of the person or subject-matter, or to set out the facts conferring jurisdiction; for jurisdiction is presumed to have existed until the contrary is clearly shown by way of defense to the action.[117] It is proper, however, and perhaps necessary, to allege that the court rendering the judgment was one of general jurisdiction, or a court of record, or to describe it in such terms that this fact may appear as a necessary inference. Upon an averment of this kind, the plaintiff may, for the purposes of his pleading, rely upon the same presumption which would avail him if he were declaring upon the judgment in the same state in which it was rendered, and leave the defendant to plead and prove

[116] Johnson v. Butler, 2 Iowa, 535, 548. And see Hall v. Mackay, 78 Tex. 248, 14 S. W. 615.

[117] Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374; Butcher v. Bank of Brownsville, 2 Kan. 70, 83 Am. Dec. 446; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; Reid v. Boyd, 13 Tex. 241, 65 Am. Dec. 61; Dunbar v. Hallowell, 34 Ill. 168; Rae v. Hulbert, 17 Ill. 572; Horton v. Critchfield, 18 Ill. 133, 65 Am. Dec. 701; Graydon v. Justus, 24 La. Ann. 222; Mink v. Shaffer, 124 Pa. 280, 16 Atl. 805; Mills v. Stewart, 12 Ala. 90; Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Scott v. Coleman, 5 Litt. (Ky.) 350, 15 Am. Dec. 71; Bank of United States v. Merchants' Bank, 7 Gill (Md.) 415; Phelps v. Duffy, 11 Nev. 80; Crane v. Crane, 19 N. Y. Supp. 691; Halstead v. Black, 17 Abb. Prac. (N. Y.) 227; Henry v. Allen, 82 Tex. 35, 17 S. W. 515; Gates v. Newman, 18 Ind. App. 392, 46 N. E. 654; Kunze v. Kunze, 94 Wis. 54, 68 N. W. 391, 59 Am. St. Rep. 857; Bruckman v. Taussig, 7 Colo. 561, 5 Pac. 152. In a few states, a contrary rule prevails, and it is held to be necessary to set forth the facts showing jurisdiction. See Dodd v. Groll, 8 Ohio Cir. Dec. 334; Wilhelm v. Parker, 17 Ohio Cir. Ct. R. 234; Gebhard v. Garnier, 12 Bush (Ky.) 321, 23 Am. Rep. 721. In Minnesota, the early case of Karns v. Kunkle, 2 Minn. 313 (Gil. 268), appears to have been overruled by the decision in Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661.

want of jurisdiction if he can.[118] In a case where the complaint alleged that, at a date named, "at Baltimore, in the state of Maryland, the Baltimore City Court, being a court of general jurisdiction, in an action therein pending between the above-named plaintiff and defendant, by its judgment duly given and made, adjudged that the plaintiff have and recover of the defendant the sum of $10,350," it was held that this was a sufficient averment of the jurisdiction of that court.[119] Again, where the judgment was alleged to have been rendered by the "Boone County circuit court in the state of Indiana," it was held unnecessary to allege in direct terms that such court was a court of general jurisdiction, for judicial notice would be taken of the fact that the circuit courts of a sister state were courts of that character.[120] If, however, it should appear from the record that the judgment was against a non-resident, it seems that an exception must be made to the general rule. Thus where, in a declaration on a judgment rendered by a court in Louisiana, the same being a court of general jurisdiction, it appeared that the defendants were residents of New Hampshire when the judgment was rendered, it was held that the failure of the plaintiff to allege that they were duly served with notice of the suit, or that they appeared and answered thereto, made the declaration demurrable.[121] And it is further to be observed that if the court rendering the judgment was one of limited, inferior, or statutory jurisdiction, or if the proceedings were in derogation of the common law, jurisdiction will not be presumed, but must be affirmatively shown by the face of the record or fully and distinctly pleaded and proved.[122] For even in the case of domestic judgments,

[118] Tenney v. Townsend, 9 Blatchf. 274, Fed. Cas. No. 13,832.

[119] Meredith v. Santa Clara Mining Ass'n, 56 Cal. 178.

[120] Specklemeyer v. Dailey, 23 Neb. 101, 36 N. W. 356, 8 Am. St. Rep. 119.

[121] Wilbur v. Abbot (C. C.) 6 Fed. 814; Gude v. Dakota Fire & M. Ins. Co., 7 S. D. 644, 65 N. W. 27, 58 Am. St. Rep. 860.

[122] Gay v. Lloyd, 1 G. Greene (Iowa) 78, 46 Am. Dec. 499; Gunn v. Howell, 27 Ala. 663, 62 Am. Dec. 785; Pelton v. Platner, 13 Ohio, 209, 42 Am. Dec. 197; Commonwealth v. Blood, 97 Mass. 538; Grant v. Bledsoe, 20 Tex. 456; Ellis v. White, 25 Ala. 540; Sheldon v. Hopkins, 7 Wend. (N. Y.) 435. And see Snyder v. Snyder, 25 Ind. 399; Etz v. Wheeler, 23 Mo. App. 449; McLaughlin v. Nichols, 13 Abb. Prac. (N. Y.) 244; Archer v. Romaine, 14 Wis. 375.

as we have already seen, there can be no presumption in favor of the jurisdiction of such courts, unless all the facts necessary thereto appear on the face of the proceedings.[123]

§ 876. Authentication of Record.

The act of congress provides, "That the records and judicial proceedings of the courts of any state shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form." [124] The specific directions of this statute must be followed in authenticating a record from one state to another. Also it governs the admissibility of records from the state courts when pleaded or given in evidence in the federal courts.[125] It has been held that the legislature of a state may control the mode of authentication of the records and judicial proceedings of other states, within its own limits and in its own courts,—that the method of authentication prescribed by congress is not exclusive of any that the states may adopt in their own courts.[126] But the true doctrine appears to be that while any state, for the purposes of its own courts, may dispense with any element of the authentication directed by the act, so as to receive a record which is certified in a less formal or less complete manner than the statute contemplates, yet it has no power to add to the requirements of the law, so as to require a more formal or more detailed authentication than that prescribed; and if any record is authenticated in a manner which exactly complies with the act of congress, no state court could refuse to admit it, whatever might be the provisions of the state law.[127] Where an action is brought on

[123] See supra, vol. 1, § 282.

[124] Act May 26, 1790 (1 Stat. 122; Rev. St. § 905).

[125] U. S. v. Biebusch (C. C.) 1 Fed. 213.

[126] Latterett v. Cook, 1 Iowa, 1, 63 Am. Dec. 428; Ellis v. Ellis, 55 Minn. 401, 56 N. W. 1056, 23 L. R. A. 287, 43 Am. St. Rep. 514.

[127] Kingman v. Cowles, 103 Mass. 283; Parke v. Williams, 7 Cal. 247; McMillen v. Lovejoy, 115 Ill. 498, 4 N. E. 772. A transcript of a judgment from another state, duly authenticated by the proper officers, is admissible, and is sufficient evidence of the validity of the judgment, though it does not

a judgment of a sister state, and a transcript of the judgment is attached to the petition and made a part thereof, it is not necessary that the transcript should be authenticated as prescribed by the act of congress or by the state laws. "As an exhibit," said the supreme court of Kansas in making this ruling, "it was not necessary that the copy of the judgment should be authenticated at all. The allegations of the petition answered the purpose for the time being of a due authentication of the judgment. If the judgment had been denied by a pleading verified by an affidavit, and if it had become necessary to prove the judgment, then it would have been necessary that the transcript of the judgment offered in evidence should be properly authenticated." [128] If a state should go out of the Union, so as to stand in the relation of a foreign government for a time, yet, upon its return to the Union again, all judgments rendered while it was in such position of a foreign government must be authenticated in the same way as other state records.[129]

§ 877. Completeness of Record.

It is necessary that the transcript produced should be a complete copy of the record in the case, and not merely a transcript of the minutes or of part of the record.[130] But if the clerk certifies that the transcript is "truly taken and correctly copied" from the records in his office, or uses words of similar import, it will be presumed that the transcript is a correct copy of the entire record.[131] The existence, loss, and contents of the petition and citation in the foreign action may be shown by the clerk of the court who issued the citation and the attorneys who prepared the petition.[132] Where the plaintiff sets

appear that the judgment or the minutes of the court were signed by the judge. Dean v. Stone, 2 Okl. 1, 35 Pac. 578; McFarland v. Fricks, 99 Ga. 104, 24 S. E. 868.

[128] White v. Treon, 25 Kan. 484.

[129] Steere v. Tenney, 50 N. H. 461.

[130] Pepin v. Lachenmeyer, 45 N. Y. 27. And see Missouri Glass Co. v. Gregg (Tex. App.) 16 S. W. 174; Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466, 1 Am. St. Rep. 661; Bowman v. Hekla Fire Ins. Co., 58 Minn. 173, 59 N. W. 943; Williams v. Williams, 53 Mo. App. 617.

[131] Reber v. Wright, 68 Pa. 471; Ferguson v. Harwood, 7 Cranch, 408, 3 L. Ed. 386. See, also, Blair v. Caldwell, 3 Mo. 353.

[132] Bailey v. Martin, 119 Ind. 103, 21 N. E. 346.

out, by way of inducement, a judgment of a sister state and an affirmance thereof on error in the appellate court, and the defendant pleads nul tiel record to the judgment mentioned, without specifying which one, an exemplification of the judgment of the appellate court, which recites the record of the judgment below, is sufficient.[133]

If the record of a foreign judgment does not show service of process, or an appearance by the defendant against whom suit is brought on such judgment in another state, the record is not admissible.[134] But a record which did not originally show service on the defendant will be admissible in evidence in an action thereon after having been amended on due notice, so as to show that fact affirmatively.[135] Where the action is brought by an assignee of the judgment, a certified copy of the assignment recorded in the court where the judgment was rendered, and made a part of the record of the judgment, is competent evidence of the assignment.[136] And in an action on a judgment of another state, it is error to exclude as evidence a transcript of the judgment simply because it is without a caption.[137] And so, if sufficient appears in the transcript to identify the actual record with the record sued on, it is immaterial that there is a variance in the titles as given in the transcript and in the petition.[138] So also, in an action on a judgment of a sister state, a clerical misprision, apparent on the face of the judgment, in the computation of the amount, may and should be corrected.[139]

§ 878. Attestation of Clerk, and Seal.

The general opinion appears to be that the act of congress only requires that the attestation of the clerk shall be in the form prescribed for the court in which the judgment was rendered, and that the certificate of the judge that the clerk's attestation is in due form

[133] Phipps v. Nye, 34 Miss. 330.

[134] Cunningham v. Spokane Hydraulic Co., 18 Wash. 524, 52 Pac. 235.

[135] Cunningham v. Spokane Hydraulic Min. Co., 20 Wash. 450, 55 Pac. 756, 72 Am. St. Rep. 113.

[136] Caughran v. Gilman, 81 Iowa, 442, 46 N. W. 1005.

[137] Taylor v. Smith (Tenn. Ch. App.) 36 S. W. 970.

[138] Brady v. Palmer, 19 Ohio Cir. Ct. R. 687.

[139] Reynolds v. Powers, 96 Ky. 481, 29 S. W. 299.

is conclusive.[140] But in a case in New York, where the attestation was signed by a deputy clerk, instead of the clerk of the court, it was held that the defect was not cured by the certificate of the presiding magistrate that the attestation was in due form and authorized by the state law; for, said the court, it is immaterial that the attestation conforms to the law of the state, it must conform to the act of congress.[141] The record is not necessarily invalidated by the want of the attestation of the person who, at the date of the judgment, held the office of clerk of the court by which the judgment was rendered; for it may be proved by a copy attested by the clerk of another court, to whose custody the record has been by law transferred, and who is the proper officer to make and certify copies thereof.[142] When a copy of a judgment from another state, offered in evidence, is partly printed and partly written, but has the clerk's certificate at the end of the written part only, whether the certificate applies to the whole roll or to the written part alone is a question of fact to be determined by inspection and examination of the papers.[143] It is not necessary for the judge to certify that the seal annexed to the record is the seal of the court. The seal is self-proving, and it will be presumed that it

[140] Ferguson v. Harwood, 7 Cranch, 408, 3 L. Ed. 386; Andrews v. Flack, 88 Ala. 294, 6 South. 907; Grover v. Grover, 30 Mo. 400. Where the judge is ex officio clerk of his own court, both certificates of authentication specified as necessary for the attestation of the records of a court of another state are not required, his certificate as judge being sufficient. Wilson v. Phoenix Powder Manuf'g Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

[141] Morris v. Patchin, 24 N. Y. 394, 82 Am. Dec. 311. In Pennsylvania and Missouri, also, it is held that the certificate is defective and insufficient if made by a deputy instead of the clerk himself. Ensign v. Kindred, 163 Pa. 638, 30 Atl. 274; Williams v. Williams, 53 Mo. App. 617. But in Illinois, the doctrine appears to be that inquiry should be made into the statutes of the state from which the record comes, and if they are found to authorize the authentication of records by a deputy clerk, his certificate will be sufficient. Hull v. Webb, 78 Ill. App. 617.

[142] Folsom v. Blood, 58 N. H. 11; Thomas v. Tanner, 6 T. B. Mon. (Ky.) 52. In a case where the certificate to the record of a judgment from another state was defective for want of the signature of the clerk of the court, and the defendant pleaded nil debet and "payment with leave," it was held that, inasmuch as the former plea was a nullity, and the latter admitted the cause of action, the plaintiff was entitled to recover, notwithstanding the irregularity of the certificate. Curtis v. Hubbell, 8 Wkly. Notes Cas. (Pa.) 367.

[143] Goodrich v. Stevens, 116 Mass. 170.

was affixed by the proper officer having the custody of it.[144] The statute is broad enough to cover the authentication of a record from a court which does not possess a seal. But if such is the case, it should be so stated, by either the clerk or the judge, in the certificate.[145] Where the clerk authenticated the record by his signature and private seal, stating in the same place that the court itself had no seal, it was held that the record was sufficiently authenticated; the private seal of the clerk was surplusage, and would not vitiate the certificate, which, without it, would be good and sufficient.[146]

§ 879. Certificate of Judge.

An objection to a transcript of a judgment from another state, that it contains no certificate of the presiding judge "that the attestation is in due form of law," must be specific.[147] This certificate is held to be indispensable.[148] And it must be annexed to the exemplification of the record, and cannot be on a separate piece of paper.[149] If the judge is clerk of his own court, he must first, as clerk, attest the record, and then as judge, certify that the attestation is in due form, in all respects the same as if the two offices were filled by distinct persons.[150] But it is not necessary that the official character of the judge certifying the record should be evidenced by the certificate of the governor under the great seal of the state, nor that the clerk of the court should certify under his hand and seal of office that the certifying judge is duly commissioned and qualified to act.[151] The record should not be rejected because the certificate does not show that the judge signing it is the sole judge or the chief judge of the circuit, unless from the record it affirmatively appears that there

[144] Ducommun v. Hysinger, 14 Ill. 249; Hull v. Webb, 78 Ill. App. 617.

[145] Craig v. Brown, Pet. C. C. 352, Fed. Cas. No. 3,328; Kirkland v. Smith, 2 Mart. (N. S.; La.) 497.

[146] Flourenoy v. Durke, 2 Brev. (Conn.) 256.

[147] Dworak v. More, 25 Neb. 735, 41 N. W. 777.

[148] Hutchins v. Gerrish, 52 N. H. 205, 13 Am. Rep. 19.

[149] Norwood v. Cobb, 20 Tex. 588.

[150] Bissell v. Edwards, 5 Day (Conn.) 363, 5 Am. Dec. 166; Catlin v. Underhill, 4 McLean, 199, Fed. Cas. No. 2,523. But compare Wilson v. Phœnix Powder Manuf'g Co., 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890.

[151] Kinsley v. Rumbough, 96 N. C. 193, 2 S. E. 174; McAllister v. Singer Manuf'g Co., 64 Ga. 622.

were other judges of such circuit.[152] But where a court comprises several judges, each of whom, in turn, acts as chief judge, on a system of rotation, it does not belong to any of them to certify a record for use in another state, but only to the one who, at the time, is acting as chief judge.[153] In a case where the clerk's certificate to a record from an inferior court of another state, was authenticated by the signatures of five persons who all styled themselves "presiding justices" of the court, the court where the record was offered in evidence looked into the laws of that state, and found that the judges of that tribunal were apparently all equal, and that no one of them was president or chief of the court. And it was accordingly held that the mode of authentication, being adapted to the circumstances of the case, was within the meaning of the act of congress and was sufficient.[154]

§ 880. Amount of Recovery; Interest.

At the common law no judgments carried interest. In the absence of proof to the contrary, the common law is presumed to furnish the rule of decision in a sister state. And therefore, in an action on a judgment of a sister state, no interest can be allowed on the judgment, unless evidence is presented of a statute of that state changing the common law rule in this respect.[155] But in a case where the statute provided that interest on any judgment of any court should be allowed at the rate of six per cent. from the rendition of the judgment to payment, it was held that, in a suit on a sister state judgment such interest was properly allowed, although there was no proof of the statute in relation to interest in the state where the judgment was rendered.[156] And where a judgment in one state bears interest on the amount by its terms, such interest may be recovered in another

[152] Keyes v. Mooney, 13 Or. 179, 9 Pac. 400.

[153] Shaw v. Hurd, 3 Bibb (Ky.) 371.

[154] Arnold v. Frazier, 5 Strob. (S. C.) 33.

[155] Thompson v. Monrow, 2 Cal. 99, 56 Am. Dec. 318; Cavender v. Guild, 4 Cal. 250; Harrison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227. But see per contra, Hopkins v. Shepard, 129 Mass. 600; Williams v. President, etc., of American Bank, 4 Metc. (Mass.) 317; Barringer v. King, 5 Gray (Mass.) 9; Mahurin v. Bickford, 6 N. H. 567; Warren v. McCarthy, 25 Ill. 95; Reynolds v. Powers (Ky.) 29 S. W. 299.

[156] Shickle v. Watts, 94 Mo. 410, 7 S. W. 274.

state without showing that judgments ordinarily carry interest by the laws of the state where the particular judgment was rendered.[157]

PART III. DEFENSES TO ACTION ON SISTER STATE JUDGMENTS.

§ 881. Objections to Character of Judgment.

Since a judgment rendered in one of the states is entitled to the same faith and credit in every other state which it receives at home, it follows that, in an action upon such judgment, no defenses are admissible except such as could be set up in an action on the same judgment in the state of its rendition, and except the defense of want of jurisdiction and perhaps fraud. But we have seen that the judgment must be a valid one, and in full force and virtue, in order to constitute a cause of action. Hence the defendant may show that the judgment is absolutely void, or was rendered by an unlawful body assuming to be a court, or has been reversed or set aside, or that its collection has been enjoined, or that there is not enough to constitute a judgment, or any other circumstance negativing the existence of a legal and subsisting sentence. For instance, he may show that since the joining of the issue, the judgment sued on has been vacated.[158] It is also open to him to defend on the ground that the adjudication in question is merely interlocutory and not the proper foundation for a suit;[159] or that it was rendered upon a summary proceeding, in derogation of the common law, and not enforceable beyond the local jurisdiction;[160] or that it was given for a penalty or forfeiture, or upon a violation of the local police regulations of the state where ren-

[157] Hudson v. Daily, 13 Ala. 722.

[158] Kinsey v. Ford, 38 Barb. (N. Y.) 195.

[159] Supra, § 867.

[160] Supra, § 867. But a judgment entered by the clerk of the court, in a default case, on the filing of the summons and complaint and proof of service of summons, and that no answer or demurrer had been filed, if authorized by the law of the state where such judgment is entered, is a judicial act or proceeding, within the meaning of the constitution, and is entitled to due recognition in the courts of other states. Fred Miller Brewing Co. v. Capital Ins. Co., 111 Iowa, 590, 82 N. W. 1023, 82 Am. St. Rep. 529. On the question whether a decree made in a proceeding on habeas corpus can have any operative effect or binding force in another state, see People v. Dewey, 23 Misc. Rep. 267, 50 N. Y. Supp. 1013; Slack v. Perrine, 9 App. D. C. 128.

dered;[161] or that it purports to affect the title or right to real property situate beyond the territorial jurisdiction of the court.[162] These, and similar defenses, do not involve any impeachment of the judgment on its merits, which is really all that the constitution forbids.[163] So a defendant sued in Michigan on a judgment rendered in Ohio on a cognovit, may prove any defense which in the latter state would be a good ground for setting aside the judgment, or for an order to deliver up the cognovit to be cancelled.[164]

§ 882. Pendency of Appeal.

If, by the law of the state in which a judgment is obtained, an appeal does not operate as a supersedeas or stay proceedings on the judgment in that state, the conclusiveness of the judgment is not thereby impaired, and the pendency of such appeal is no bar to an action on the judgment in another state.[165] And in order to ascertain the effect of an appeal in the state where the judgment was rendered, the court will examine the laws and practice of that state, or even take judicial notice of them when no evidence is produced.[166] But it is proper for the court to withhold final judgment until the appeal shall have been determined, or to order that no execution shall be issued on the judgment which it renders, the defendant giving bonds to satisfy the judgment and pay costs in case the appeal shall be determined adversely to him.[167]

161 Supra, §§ 870, 871.

162 Supra, § 872.

163 Supra, §§ 856, 857.

164 Giddings v. Whittlesey, 2 Mich. N. P. 240.

165 Faber v. Hovey, 117 Mass. 107, 19 Am. Rep. 398; Clark v. Child, 136 Mass. 344; Bank of North America v. Wheeler, 28 Conn. 433, 73 Am. Dec. 683; Paine v. Schenectady Ins. Co., 11 R. I. 411; Union Trust Co. v. Rochester & P. R. Co. (C. C.) 29 Fed. 609; Piedmont & Arlington Life Ins. Co. v. Ray, 75 Va. 821; Rogers v. Hatch, 8 Nev. 35; Woodbridge & Turner Engineering Co. v. Ritter (C. C.) 70 Fed. 677; Succession of Gaines, 45 La. Ann. 1237, 14 South. 233; Dow v. Blake, 148 Ill. 76, 35 N. E. 761, 39 Am. St. Rep. 156; Lonergan v. Lonergan, 55 Neb. 641, 76 N. W. 16; Taylor v. Shew, 39 Cal. 536, 2 Am. Rep. 478; Falkner v. Franklin Ins. Co., 1 Phila. (Pa.) 183.

166 Paine v. Schenectady Ins. Co., 11 R. I. 411.

167 Piedmont & Arlington Life Ins. Co. v. Ray, 75 Va. 821; Paine v. Schenectady Ins. Co., 11 R. I. 411; Magnolia Metal Co. v. Sterlingworth Ry. Supply Co., 6 North. Co. R. (Pa.) 358.

§ 883. Defense cannot be Taken on the Merits.

The judgment of a competent court in another state, as we have already seen, is final and conclusive upon the merits. Consequently, in an action upon it, no defense can be heard which goes to the merits of the original controversy. In other words, no defense can be set up against a judgment from a sister state which might with proper diligence have been interposed in the action in which the judgment was rendered.[168] Pleas, for example, that the defendant was an infant, that he was not a partner as alleged, that he did not make the note on which the judgment was rendered, that he had no interest in such note,—are all bad.[169]

§ 884. Nil Debet not a Good Plea.

In an action on a judgment recovered in a sister state, nil debet is not a good plea; for the judgment is entitled to the full dignity of a record, and such a plea, disregarding the conclusiveness of the adjudication, would throw open the merits of the controversy to a re-investigation; hence the only proper form of the general issue in such an action is nul tiel record.[170] Although this doctrine is fully established by the decisions of the federal courts, and recognized

[168] Snow v. Mitchell, 37 Kan. 636, 15 Pac. 224; Weir v. Vail, 65 Cal. 466, 4 Pac. 422; Powell v. Davis, 60 Ga. 70; Sharman v. Morton, 31 Ga. 34; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306; Sammis v. Wightman, 31 Fla. 10, 12 South. 526.

[169] Sharman v. Morton, 31 Ga. 34.

[170] Mills v. Duryee, 7 Cranch, 481, 3 L. Ed. 411; Hampton v. McConnel, 3 Wheat. 234, 4 L. Ed. 378; McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177; Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475; Maxwell v. Stewart, 22 Wall. 77, 22 L. Ed. 564; Jacquette v. Hugunon, 2 McLean, 129, Fed. Cas. No. 7,169; Westerwelt v. Lewis, 2 McLean, 511, Fed. Cas. No. 17,446; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Hall v. Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356; Brainerd v. Fowler, 119 Mass. 265; Bank of North America v. Wheeler, 28 Conn. 433, 73 Am. Dec. 683; Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374; Evans v. Tatem, 9 Serg. & R. (Pa.) 252, 11 Am. Dec. 717; Benton v. Burgot, 10 Serg. & R. (Pa.) 240; Jones v. Quaker City Mut. F. Ins. Co., 23 Pa. Co. Ct. R. 529; Marx v. Logue, 71 Miss. 905, 15 South. 890; Kemp v. Mundell, 9 Leigh (Va.) 12; Hensley v. Force, 12 Ark. 756; Davis v. Lane, 2 Ind. 548, 54 Am. Dec. 458; Buchanan v. Port, 5 Ind. 264; Lawrence v. Jarvis, 32 Ill. 304; Zepp v. Hager, 70 Ill. 223.

and accepted in a great majority of the states, there are still one or two jurisdictions in which, as a matter of local practice, nil debet is considered a good plea in debt on a judgment rendered in another state. In these states, however, under that plea, no inquiry is allowed to be made into the merits of the case, but only into the jurisdiction of the court, or matters in discharge of the judgment.[171] Theoretically, this practice does not comport with the dignity ascribed to the judgment as a record, although practically it does not enlarge the number or character of available defenses.

§ 885. Nul Tiel Record.

As stated in the preceding section, nul tiel record is the only proper form of the general issue in an action on a judgment rendered in a sister state. But where the suit is upon a decree in chancery, it is held that this is not a good plea. For proceedings in the courts of chancery are not regarded as records, at least at common law. In such a case, if the defendant means to deny the existence of the decree, he should frame his plea so as to meet the averment in the declaration, and the tender of issue should conclude to the country.[172]

§ 886. Incompleteness of Record.

The insertion in a transcript of a foreign record of matters which do not properly belong to the record is no ground for the suppression of the entire transcript. Nor will such transcript be suppressed on the ground that a material part of the record appears to have been fraudulently suppressed, when there is nothing in the record to show that the omitted part was attainable by the clerk. It will be presumed that the omitted papers had been lost or destroyed, rather than that they were fraudulently withheld.[173]

[171] Wright v. Boynton, 37 N. H. 9, 72 Am. Dec. 319; Judkins v. Union Mut. Fire Ins. Co., 37 N. H. 470; Beale v. Berryman, 30 N. J. Law, 216.

[172] Evans v. Tatem, 9 Serg. & R. (Pa.) 252, 11 Am. Dec. 717.

[173] Gunn v. Howell, 35 Ala. 144, 73 Am. Dec. 484.

§ 887. Want of Jurisdiction.

It is well settled doctrine that if the court which renders a judgment has no jurisdiction over the parties or the subject-matter, it is always open to the defendant to show this fact when he is sued on the judgment in another state. In such a case he is not to be confined to the single plea of nul tiel record, but is at liberty to plead the want of jurisdiction specially. For instance, he can show that the attorney had no power or authority to confess judgment against him, and while such a plea is pending, it is error to render judgment on the plea of nul tiel record.[174] The whole subject of jurisdictional inquiries will be fully considered in the next division of this chapter.

§ 888. Personal Disability of Defendant.

As to whether the personal disability of the defendant, at the time the judgment was rendered against him, is a good defense to an action on such judgment in another state, the question depends upon the status of the judgment in the state of its rendition. Its validity must be tested by the laws of that state. If the coverture, infancy, or insanity is regarded, in the state where the judgment is rendered, as making the judgment absolutely void, that invalidity may undoubtedly be shown against it in any other jurisdiction. If on the other hand, the rendition of a judgment against such a person is regarded, in the state where it is given, as a mere irregularity or error in fact, having no greater effect than to make the judgment voidable on a proper direct proceeding for that purpose, then it will not be a good defense to an action on the judgment in another state.[175] This rule is illustrated by a case ruled in Iowa. The action was on a judgment rendered by a court of general jurisdiction in a sister state. The defendant answered that the judgment was void because rendered while he was a minor, upon a contract not made for necessaries; that he did not appear and defend said suit by guardian, but by an attorney, whom he had no power to appoint; that said court therefore acquired no jurisdiction over his person or

[174] Hindman v. Mackall, 3 G. Greene (Iowa) 170.

[175] On the validity of such judgments, see supra, vol. 1, §§ 188, 193, 205.

property; and that upon arriving at his majority he disavowed the said judgment, the contract upon which it was founded, and the appointment of said atttorney. The trial court sustained a demurrer to this answer, and on appeal the supreme court held that such action was right. Wright, C. J., observed: "The demurrer was properly sustained. Defendant's remedy was by writ of error coram nobis or other similar process in the court where the judgment was rendered. If there was an error in fact in permitting defendant to appear by attorney, when a minor, it was an irregularity, and as such no more affected the validity of the judgment than if it had been an error in law. In either case, the error, whether of law or fact, does not render a judgment void; but a party may have his remedy in the state where the judgment was rendered either in the same or in an appellate tribunal. The defense cannot prevail here; for, until set aside, the judgment would have full force and effect in Ohio, and is entitled to the same here. The error does not go to the jurisdiction of the court." [176]

§ 889. Error and Irregularity.

The courts will not assume to review or correct judgments rendered in other states. And it is therefore no good defense to an action on a sister state judgment that the same is erroneous or irregular, if not absolutely void.[177] Further, all reasonable presumptions will be indulged in favor of the regularity of such judgments. Thus, while ordinarily judgments can only be entered in term time, yet where the duly authenticated record of a court of general jurisdiction of a sister state shows a judgment entered in vacation, it will be presumed, in the absence of any showing to the contrary,

[176] Milne v. Van Buskirk, 9 Iowa, 558. See, also, Hanna v. Read, 102 Ill. 596, 40 Am. Rep. 608.

[177] Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144; Hearfield v. Bridges, 21 C. C. A. 212, 75 Fed. 47; Slack v. Perrine, 9 App. D. C. 128; Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Rocco v. Hackett, 2 Bosw. (N. Y.) 579; First Nat. Bank v. Wallis, 59 N. J. Law. 46, 34 Atl. 983; Crawford v. Simonton's Ex'rs, 7 Port. (Ala.) 110; Hassell v. Hamilton, 33 Ala. 280; Conway v. Ellison, 14 Ark. 330; Fitzsimmons v. Johnson, 90 Tenn. 416, 17 S. W. 100; Olds v. Glaze, 7 Iowa, 86; Struble v. Malone, 3 Iowa, 586.

that such a judgment was authorized by the laws of that state.[178] On the same principle, the objection that the judgment has not been signed by the judge is of no avail; for it will be presumed that by the law of the state where the judgment was rendered such signature was unnecessary.[179] In an action on a foreign judgment, the court will not inquire whether the original action was by or against all the proper parties.[180] And if it appears from the record that the court had jurisdiction, the defendant cannot show that he and his attorney made mistakes, and that the judgment was consequently for more than was due.[181] And so, a plea that the note on which a judgment of a court of a sister state was recovered was not produced or filed in the cause in which the judgment was obtained, is bad on demurrer.[182]

§ 890. Payment.

The defense of payment may be set up in an action on any judgment, domestic or foreign. But the fact that the plaintiff in the original judgment has taken out execution thereon and levied on and advertised for sale the lands of the defendant situate within the jurisdiction in which the judgment was entered, affords no ground for a continuance of the suit upon such foreign judgment, as it shows no present defense to the action.[183]

§ 891. Adjudication in Bankruptcy.

If, by the laws and practice of one state, a discharge in bankruptcy is a good defense there to a judgment recovered after such discharge was obtained, but founded on a claim which existed before the commencement of the bankruptcy proceedings, the discharge will be a good defense to an action on the judgment in another state, although the rule in the latter state upon judgments recovered in

[178] Dodge v. Coffin, 15 Kan. 277; McLendon v. Dodge, 32 Ala. 491.
[179] French v. Pease, 10 Kan. 51.
[180] Fred Miller Brewing Co. v. Capital Ins. Co., 111 Iowa, 590, 82 N. W. 1023, 82 Am. St. Rep. 529; Hearfield v. Bridges, 21 C. C. A. 212, 75 Fed. 47.
[181] Edwards v. Jones, 113 N. C. 453, 18 S. E. 500.
[182] Sammis v. Wightman, 31 Fla. 10, 12 South. 526.
[183] Field v. Sanderson, 34 Mo. 542, 86 Am. Dec. 124.

that state may be different.[184] Where, pending a suit in a state court, the defendant pleaded that he had been adjudicated a bankrupt and prayed a stay of proceedings, but subsequently withdrew the plea and confessed judgment, such conduct amounted to a new promise to pay and an agreement that the judgment should bind him, and precluded him, in a subsequent suit on the judgment, from making any defense which arose prior to the confession, including the defense of bankruptcy; and under such facts, the plea of bankruptcy would not avail as a defense to a suit on the judgment in another state.[185]

§ 892. Statute of Limitations.

The statute of limitations of the state of the forum may be pleaded in defense to an action on a judgment of a sister state, if the statute is so framed as to include judgments.[186] And such an action will be barred by the statute, when the prescribed period has elapsed since the rendition of the judgment, notwithstanding it appears that the judgment has been revived, in the court where it was rendered, in time to save the bar of the statute, when the revival was had upon merely ex parte proceedings, without any notice to the defendant, who was not a resident of the state. For the purpose of enforcing it beyond the jurisdiction of the state, such judgment of revival is a mere nullity.[187]

The statute of limitations to be applied is the statute of the state where suit is brought on the judgment, not that of the state where the judgment was rendered.[188] "Remedies are to be regulated and

[184] Haggerty v. Amory, 7 Allen (Mass.) 458. See, further, Bradf rd v. Rice, 102 Mass. 472, 3 Am. Rep. 483; Revere Copper Co. v. Dimock, 90 N. Y. 33; Anderson v. Anderson, 65 Ga. 518, 38 Am. Rep. 797.

[185] Anderson v. Clark, 70 Ga. 362.

[186] McElmoyle v. Cohen, 13 Pet. 312, 10 L. Ed. 177; Napier v. Gidiere, 1 Speers, Eq. (S. C.) 215, 40 Am. Dec. 613; Reid v. Boyd, 13 Tex. 241, 65 Am. Dec. 61; Summerside Bank v. Ramsey, 55 N. J Law, 383, 26 Atl. 837; Robb v. Anderson, 43 Ill. App. 575; Pierce v. Davidson, 58 Mo. App. 10[illegible].

[187] Kay v. Walter, 28 Kan. 111. And see Owens v. McCloskey, 161 U. S. 642, 16 Sup. Ct. 693, 40 L. Ed. 837; Rice v. Moore, 48 Kan. 590, 30 Pac. 10, 16 L. R. A. 198, 30 Am. St. Rep. 318; Hepler v. Davis, 32 Neb. 556, 49 N. W. 458, 13 L. R. A. 565, 29 Am. St. Rep. 457.

[188] Beer v. Simpson, 65 Hun, 17, 19 N. Y. Supp. 578; Mowry v. Cheesman,

pursued according to the lex fori, the law of the place where the action is instituted, and not by the lex loci contractus, or the law of the place where the contract was made or the judgment rendered." Hence in an action on a sister state judgment, it is quite immaterial what may be the period prescribed for suing on judgments by the statute of limitations of that state. If any limitation exists, it must be found in the laws of the state where the suit is brought. And if the statute of the latter state is restricted in terms to domestic judgments, then there is no limitation to a suit on a judgment from a sister state, except such as lies in the common law presumption against any judgment after twenty years.[189] It follows that although a judgment is barred, as a cause of action, by the statute of limitations of the state in which it was rendered, yet an action may be maintained upon it in the courts of another state, if the statute of the latter state has not run against it; in such cases it is the lex fori which governs.[190] But in at least one state (West Virginia), by the express terms of the code, a judgment obtained in another state is not barred, if not barred in the state where rendered.[191]

Which clause of the statute is to be applied to actions on foreign judgments, or whether its provisions embrace such causes of action at all, is a question which may sometimes cause no little embarrassment. In an early New York case it was said: "The statute of limitations may be pleaded to all actions of debt upon simple contract; and the judgment upon which the suit is brought [one rendered in Connecticut] cannot, according to the settled doctrine of this court, be viewed in any higher light."[192] But the more approved rule is that such judgments do not come within the usual

6 Gray (Mass.) 515; Egberts v. Dibble, 3 McLean, 86, Fed. Cas. No. 4,307; Hendricks v. Comstock, 12 Ind. 238, 74 Am. Dec. 205; Succession of Lucas, 11 La. Ann. 296; Bauserman v. Charlott, 46 Kan. 480, 26 Pac. 1051. Compare Bemis v. Stanley, 93 Ill. 230.

189 Gulick v. Loder, 13 N. J. Law, 68, 23 Am. Dec. 711.

190 Miller v. Brenham, 68 N. Y. 83. And see Stewart v. Spaulding, 72 Cal. 264, 13 Pac. 661; Waddill v. Cabell, 21 D. C. 597.

191 Code W. Va. 1868, c. 104, § 13; Watkins v. Wortman, 19 W. Va. 78.

192 Hubbell v. Coudrey, 5 Johns. 132, following Dupleix v. De Roven, 2 Vern. 540.

clause of the statute relating to actions "on contract or debt without specialty." The limitation must be looked for in the provisions of the statute specifically applicable to judgments and other debts of record.[193] The question will then be, whether such provisions are broad enough to cover the case of judgments from another state, or must be restricted to domestic judgments. And this must be determined, in each state, by the wording of its own statute. In Texas, a judgment of a court of record of a sister state is barred only by the space of time which would cut off a suit on a domestic judgment, viz., ten years.[194]

The statute is unconstitutional if its effect is to prevent entirely the enforcement of a judgment recovered in another state. This principle was clearly brought out in a case decided in California.[195] It appeared that a statute of that state provided that "an action upon any judgment, contract, obligation, or liability, for the payment of money or damages, obtained, executed, or made out of this state, can only be commenced within two years from the time the action has accrued or shall accrue." Giving to this statute a retrospective effect, as required by its terms, it would apply to the case at bar (a judgment recovered in another state), and would altogether cut off the remedy upon it, whereas the former statute of limitations had not yet run against it. The court said: "It is well settled that a judgment, in this sense of the constitution, is a contract," that is, in

[193] Patten v. Ray, 4 Cal. 287; Evans v. Cleary, 125 Pa. 204, 17 Atl. 440, 11 Am. St. Rep. 886; Todd v. Crumb, 5 McLean, 172, Fed. Cas. No. 14,073; Dore v. Thornburgh, 90 Cal. 64, 27 Pac. 30, 25 Am. St. Rep. 100; Haupt v. Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698. An action of debt on a foreign judgment is not within the Pennsylvania statute of six years limitation, for the action is not grounded on a "lending" or "contract," as those words are used in the statute, though the judgment sued on may have been based on such a lending or contract. Weiseberger v. Nevil, 11 Pa. Co. Ct. R. 40. In Illinois, a suit on a foreign judgment is not governed by that clause of the statute which relates to "actions on bonds, promissory notes, bills of exchange, written leases, written contracts, or other evidences of indebtedness in writing," but by that provision which bars in five years "all civil actions not otherwise provided for." Ambler v. Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202.

[194] Clay v. Clay, 13 Tex. 195; Spann v. Crummerford, 20 Tex. 216.

[195] Scarborough v. Dugan, 10 Cal. 305.

the sense of the prohibition against laws impairing the obligation of contracts.[196] And since the entire denial of a remedy, by the enactment of a period of limitation which has already run, is equivalent to an impairment of the obligation of the contract,[197] it follows that the statute could not constitutionally apply to the present case.

The statute of limitations is available as a defense only against the judgment, not against the original cause of action. That is, in an action on a judgment rendered in another state, it is not a good defense that the original cause of action would have been barred by the statute of limitations of the state where such judgment is sued on; for prescription against the original cause of action would be governed by the limitation law of the state where the suit was originally brought, and must be interposed in that suit before judgment.[198] Further, a state statute which enacts that "no action shall be maintained on any judgment or decree rendered by any court without this state against any person who, at the time of the commencement of the action in which such judgment or decree was or shall be rendered, was or shall be a resident of this state, in any case where the cause of action would have been barred by any act of limitation of this state, if such suit had been brought therein,"—is unconstitutional and void, as it destroys the right of a party, in certain cases, to enforce a judgment regularly obtained in another state, and is therefore in conflict with art. 4, § 1, of the constitu-

[196] This proposition is open to very serious doubt. See supra vol. 1, §§ 7–11. But the constitutional objection to such a statute may well be rested on the requirement that full faith and credit shall be given to the judgments of other states. This requirement does not prevent the states from enacting and applying reasonable statutes of limitation to actions upon such judgments, although it would be violated by a law which should deny any right of action on judgments from a sister state, or operate retrospectively to cut off the remedy altogether. See Bacon v. Howard, 20 How. 22, 15 L. Ed. 811; Randolph v. King, 2 Bond, 104, Fed. Cas. No. 11,560; Meek v. Meek, 45 Iowa, 294; Fields v. Mundy's Estate, 106 Wis. 383, 82 N. W. 343; Little v. McVey (N. J.) 47 Atl. 61.

[197] Chapman v. Douglas County, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; Price v. Hopkin, 13 Mich. 318; Osborn v. Jaines, 17 Wis. 573; Auld v. Butcher, 2 Kan. 135; Black, Const. Prohib. § 152.

[198] Carter v. Adamson, 21 Ark. 287; Goodnow v. Stryker, 62 Iowa, 221, 14 N. W. 345; Reed v. Chilson, 61 Hun, 623, 16 N. Y. Supp. 744; Roberts v. Hinkle (Ky.) 43 S. W. 233.

tion.[199] But it is held that where a note made in Wisconsin, the maker and holder of which were residents there, had been barred and the debt thus extinguished (by the laws of that state as interpreted by its courts), and the note was then sued upon in a court of Illinois, the defense upon the lex loci contractus if set up there would have been good, and a judgment upon such note, entered by confession upon warrant of attorney, would be set aside, or its collection enjoined, upon that ground, in the Illinois court; and therefore the courts of Wisconsin may relieve against such judgment.[200] A judgment rendered in one state, based on the statute of limitations, where the court had jurisdiction of the parties and the cause of action, is a bar to a suit in another state on the same cause and between the same parties.[201]

§ 893. Affidavit of Defense Required.

Where the local statute authorizes judgment to be entered up by way of default if no affidavit of defense is filed, a judgment of a sister state is such a cause of action as will fall within this practice.[202]

PART IV JURISDICTIONAL INQUIRIES.

§ 894. Want of Jurisdiction Destroys Effect of the Judgment.

As a judgment or decree rendered without any jurisdiction of the person of the defendant is utterly void, so it is not capable of being enforced, nor entitled to recognition or to be received with "faith and credit," in any other state.[203] "The judgment or decree of a sister state is, as a general rule, conclusive as to the rights of the

199 Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475; Dodge v. Coffin, 15 Kan. 277.

200 Brown v. Parker, 28 Wis. 21.

201 Sweet v. Brackley, 53 Me. 346; Weeks v. Harriman, 65 N. H. 91, 18 Atl. 87, 4 L. R. A. 744, 23 Am. St. Rep. 21.

202 McCleary v. Faber, 6 Pa. 476; Motter v. Welty, 12 Pa. Co. Ct. R. 82

203 Gillespie v. Commercial Mut. Marine Ins. Co., 12 Gray (Mass.) 201, 71 Am. Dec. 743; Overstreet v. Shannon, 1 Mo. 529; Morris v. Bailey, 15 La. Ann. 2; Commonwealth v. Kirkbride, 2 Brewst. (Pa.) 419; Kerr v. Kerr, 41 N. Y. 272; Ward v. Boyce, 152 N. Y. 191, 46 N. E. 180, 36 L. R. A. 549; Looney v. Reeves, 5 Kan. App. 279, 48 Pac. 606.

parties, unless there be a want of jurisdiction in the court pronouncing it, or fraud has been practised in its procurement, or there has not been any, or only constructive, service of process on the defendant, and the proceedings have been carried on without his appearance." [204] Thus, a judgment in personam upon an obligation for the payment of money, rendered by a court of one state and under the laws thereof, is not valid as against a citizen of another state, who has never been served with process nor appeared to the suit, nor had any other knowledge or notice of it; and such judgment cannot be enforced against the property of such a defendant located in the state of his residence.[205] Even under the articles of confederation it was held that a judgment obtained in Massachusetts, in a foreign attachment where there was no personal notice to the defendant, could not be considered as conclusive evidence of the debt, when made the basis of a suit in Pennsylvania, and therefore the defendant ought still to be at liberty to controvert and deny it. "The articles of confederation must not be construed to work such evident mischief and injustice as are contained in the doctrine urged for the plaintiff." [206]

§ 895. Want of Jurisdiction Apparent on the Record.

It will sometimes happen, although not frequently, that the record of a judgment rendered in another state, when produced, will show on its face, that there was no jurisdiction in the court to pronounce the judgment. Whenever this is the case, the document is stripped of its character and dignity as a record, no presumptions will be indulged in its favor, and it will not be treated as possessing any force or validity whatever.[207] "The judgment of a court of general jurisdiction in any state in the Union," said the court in New York at an early day, "is equally conclusive upon the parties in all the other states as in the state in which it was rendered. This, however, is subject to two qualifications: First. If it appear by record that

[204] Rogers v. Rogers, 15 B. Mon. (Ky.) 364, 378.

[205] Grover & Baker S. M. Co. v. Radcliffe, 66 Md. 511, 8 Atl. 265.

[206] Phelps v. Holker, 1 Dall. 261, 1 L. Ed. 128 (1788).

[207] President, etc., of Middlesex Bank v. Butman, 29 Me. 19; Tessier v. Lockwood, 18 Neb. 167, 24 N. W. 734.

the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and second, if it appear by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him." [208] But in an action on a judgment of another state, a recital in the original writ that the defendant was an "absent and absconding debtor," where that is merely a form prescribed by law in that state, in case of trustee process, whether the defendant is in the state or not, does not show a want of jurisdiction of the person of the defendant.[209]

§ 896. Presumption in Favor of Jurisdiction.

When a court of record in one of the states has assumed to exercise jurisdiction over a subject-matter in controversy between parties resident in that state, and has pronounced judgment, and the record of such judgment, duly authenticated according to the act of congress, is made the basis of an action in another state, the legal presumption, in the absence of proof to the contrary, and although the record may be silent or ambiguous on the point, is in favor of the jurisdiction of the court rendering the judgment.[210] "It would seem to be clear,"

[208] Shumway v. Stillman, 6 Wend. 447.

[209] Bissell v. Wheelock, 11 Cush. (Mass.) 277.

[210] Lincoln v. Tower, 2 McLean, 473, Fed. Cas. No. 8,355; Buffum v. Stimpson, 5 Allen (Mass.) 591, 81 Am. Dec. 767; Van Norman v. Gordon, 172 Mass. 576, 53 N. E. 267, 44 L. R. A. 840, 70 Am. St. Rep. 304; McMahon v. Eagle Life Ass'n, 169 Mass. 539, 48 N. E. 339, 61 Am. St. Rep. 306; Pacific Pneumatic Gas Co. v. Wheelock, 80 N. Y. 278; Pringle v. Woolworth, 90 N. Y. 502; Leach v. Linde, 70 Hun. 145, 24 N. Y. Supp. 176; Veite v. McFadden, 3 Wkly. Notes Cas. (Pa.) 63; Reber v. Wright, 68 Pa. 471; Stewart v. Stewart, 27 W. Va. 167; Coskery v. Wood, 52 S. C. 576, 30 S. E. 475; Mills v. Stewart, 12 Ala. 90; Bogan v. Hamilton, 90 Ala. 454, 8 South. 186; Henry v. Allen, 82 Tex. 35, 17 S. W. 515; Dodge v. Coffin, 15 Kan. 277; Westervelt v. Jones, 5 Kan. App. 35, 47 Pac. 322; Lockhart v. Locke, 42 Ark. 17; Wilhelm v. Parker, 17 Ohio Cir. Ct. R. 234; Bailey v. Martin, 119 Ind. 103, 21 N. E. 346; Glos v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196; Caughran v. Gilman, 81 Iowa, 442, 46 N. W. 1005; Seymour v. Newman, 77 Mo. App. 578; Stahl v. Mitchell, 41 Minn. 325, 43 N. W. 385; Trowbridge v. Spinning, 23 Wash. 48, 62 Pac. 125; Carpenter v. Ritchie, 2 Wash. St. 512, 28 Pac. 380, 26 Am. St. Rep. 877; Cummings v. O'Brien, 122 Cal. 204, 54 Pac. 742. A certificate of the record of a foreign judgment, showing that it was

says the court in Kentucky, "that the judgments of the superior judicial tribunals of one of these states are prima facie entitled to the presumption in every other state that they were rendered by competent authority. They cannot therefore be impugned by a mere allegation of want of jurisdiction. But he who would defeat a judgment on this ground must show the want of jurisdiction by appropriate allegations of facts, unless it appear on the face of the judgment or record which is the basis of the action." [211] Hence, for example, where the plaintiff produces a certified copy of the record, which shows service on the defendant, and the defendant produces another certified copy which does not show service, but the two records are not contradictory, the court will take that produced by the plaintiff as a more full and extended record, and will support the action.[212] The same presumption extends to findings by the court which rendered the judgment on the subject of its own jurisdiction. Where the record shows that the court considered that there was due and legal service of process, or a sufficient waiver of notice under their laws, it will be so held in the court where the judgment is put in suit.[213] Where the record shows the return "executed in full" on the summons, this will be considered prima facie evidence of service.[214] Where the transcript showed that the action had been instituted in one common law court, and by agreement of the attorneys of the

rendered by a court of record which has a seal and a clerk, sufficiently shows, until the contrary appears, that it is the judgment of a court having jurisdiction of the parties. Coughran v. Gilman, 81 Iowa, 442, 46 N. W. 1005.

[211] Davis v. Connelly's Ex'r, 4 B. Mon. 136.

[212] Barringer v. King, 5 Gray (Mass.) 9.

[213] Nunn v. Sturges, 22 Ark. 389; Hull v. Webb, 78 Ill. App. 617; Hall v. McKay, 78 Tex. 248, 14 S. W. 615; Semple v. Glenn, 91 Ala. 245, 9 South. 265, 24 Am. St. Rep. 894. Where the supreme court of a state has decided on appeal that the trial court had jurisdiction of the subject-matter of the suit in which the appeal is taken, and of the parties thereto, and affirms the decree appealed from, such decree is not subject to collateral attack in another state, unless it be on the ground of fraud. Glos v. Sankey, 148 Ill. 536, 36 N. E. 628, 23 L. R. A. 665, 39 Am. St. Rep. 196.

[214] Blackburn v. Jackson, 26 Mo. 308. Where the record of a proceeding in a court of general jurisdiction does not show that every step essential to jurisdiction was duly taken, it must be presumed that the court proceeded to judgment only after acquiring jurisdiction by the service of all notices actually necessary. Smith v. Central Trust Co. of New York, 154 N. Y. 333, 48 N. E. 553.

parties transferred to another, with a waiver of "all possible objections to the jurisdiction" of the latter court, but no order for the transfer appeared in the transcript, and after several trials and continuances final judgment was rendered without the jurisdiction of the court ad quem being called in question, it was held that the presumption was in favor of the jurisdiction, and if the court had no jurisdiction it must arise from some provision of law which ought to have been shown.[215]

This presumption of jurisdiction, however, does not exist in cases where it appears of record that the defendant was a non-resident of the state where the original judgment was rendered. According to the United States supreme court: "Whenever it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree was rendered, was, at the time of the alleged service, without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree." [216] And even a recital in the record, that it appeared to the court that the defendant had notice of the pendency of the suit, is not presumptive evidence that the defendant, a non-resident, was served with notice within that state.[217] Furthermore, the presumption of jurisdiction does not extend to judgments rendered by justices of the peace and other inferior courts or magistrates of other states.[218] And it is held that, where it appears, in an action on a judgment from another state, that the jurisdiction of the court rendering it over the subject-matter of the suit was wholly dependent upon statute, the jurisdiction will not be presumed, but, with the statute conferring it, must be pleaded.[219]

[215] Harper v. Nichol, 13 Tex. 151.

[216] Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; Green v. Equitable Mut. Life & Endowment Ass'n, 105 Iowa, 628, 75 N. W. 635.

[217] Downer v. Shaw, 22 N. H. 277.

[218] Infra, § 936.

[219] Wilhelm v. Parker, 17 Ohio Cir. Ct. R. 234; Kohn v. Haas, 95 Ala. 478, 12 South. 577; Kelley v. Kelley, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 8[illegible], 42 Am. St. Rep. 389.

§ 897. Jurisdiction may be Inquired into.

Except in a very few states, the doctrine is firmly settled that when the judgment of a domestic court of record comes collaterally in question, the presumption that the court had jurisdiction of the subject and parties is irrefragable and conclusive, unless want of jurisdiction distinctly appears on the face of the record.[220] On the other hand, any judgment coming from a foreign country may be impeached on this ground.[221] What, then, is the status, in this respect, of judgments rendered in a sister state of the Union? Are they domestic or foreign? We have just seen that jurisdiction is presumed; but is this presumption final and incontrovertible or not? The answer must depend upon the further question, what is the effect, in this regard, of the provision of the constitution that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state?" For it is by this provision alone that such judgments are differentiated from strictly foreign judgments. When this clause of the organic law first received an authoritative interpretation, in the case of Mills v. Duryee,[222] the very broad and general terms of that decision were understood, by the state courts generally, to exclude the idea that any pleas whatever would be allowable in an action on a sister state judgment, save only such as would be pleadable against the judgment in the state of its rendition. But the question of jurisdiction was not raised in that case, and the decision does not bear directly upon it. And the rule in Mills v. Duryee was afterwards qualified and explained, so that its true value as an exposition of the constitutional provision came to be better understood. And later decisions of the same court settled the doctrine that the language in question did not place such judgments in all respects on the footing of domestic judgments, but only in respect to their conclusiveness on the merits, and was not intended to preclude an inquiry into the jurisdiction of the court rendering the judgment.[223] To this view the supreme court has always steadfastly

[220] Supra, vol. 1, §§ 271-275.

[221] Supra, § 835.

[222] 7 Cranch, 481, 3 L. Ed. 411.

[223] D'Arcy v. Ketchum, 11 How. 165, 176, 13 L. Ed. 648. In this case

adhered. And the same has been accepted, on that authority, or independently worked out, by all the state courts. So that the rule is now settled beyond possibility of change or contradiction, that, in an action on a judgment of a court of a sister state, it is open to the defendant to deny the jurisdiction of the court rendering the judgment over his person or the subject-matter of the suit.[224] "The rule

Catron, J., said: "On the other hand, the international law as it existed among the states in 1790 was, that a judgment rendered in one state, assuming to bind the person of a citizen of another, was void within the foreign state when the defendant had not been served with process or voluntarily made defense, because neither the legislative jurisdiction, nor that of courts of justice, had binding force. Subject to this established principle, congress also legislated; and the question is, whether it was intended to overthrow this principle, and to declare a new rule, which would bind the citizens of one state to the laws of another. . . . . There was no evil in this part of the existing law, and no remedy called for, and in our opinion congress did not intend to overthrow the old rule by the enactment that such faith and credit should be given to records of judgments as they had in the state where made."

[224] D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648; Bischoff v. Wethered, 9 Wall. 812, 19 L. Ed. 829; Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. Ed. 687; Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897; Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; Knowles v. Logansport Gaslight & Coke Co., 19 Wall. 58, 22 L. Ed. 70; Hill v. Mendenhall, 21 Wall. 453, 22 L. Ed. 616; Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538; Arnott v. Webb, 1 Dill. 362, Fed. Cas. No. 562; First Nat. Bank v. Cunningham (C. C.) 48 Fed. 510; Endicott v. Morgan, 66 Me. 456; Wood v. Augustins, 70 Vt. 637, 41 Atl. 583; Hall v. Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356; Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747; Mowry v. Chase, 100 Mass. 79; Carleton v. Bickford, 13 Gray (Mass.) 591, 74 Am. Dec. 652; Wright v. Andrews, 130 Mass. 149; Bissell v. Wheelock, 11 Cush. (Mass.) 277; Bissell v. Briggs, 9 Mass. 462, 6 Am. Dec. 88; McDermott v. Clary, 107 Mass. 501; Rothrock v. Dwelling-House Ins. Co., 161 Mass. 423, 37 N. E. 206, 23 L. R. A. 863, 42 Am. St. Rep. 418; Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Rathbone v. Terry, 1 R. I. 73; Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374; Starbuck v. Murray, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; Borden v. Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Kerr v. Kerr, 41 N. Y. 272; Bell v. Bell, 157 N. Y. 719, 53 N. E. 1123; Hammond v. National Life Ass'n, 31 Misc. Rep. 182, 65 N. Y. Supp. 407; In re Norton's Estate, 32 Misc. Rep. 224, 66 N. Y. Supp. 317; Reel v. Elder, 62 Pa. 308, 1 Am. Rep. 414; Noble v. Thompson Oil Co., 79 Pa. 354, 21 Am. Rep. 66; Guthrie v. Lowry, 84 Pa. 533; Mitchell v. Garrett, 5 Houst. (Del.) 34; Wernwag v. Pawling, 5 Gill & J. (Md.) 500, 25 Am. Dec. 317; Stewart v. Stewart, 27 W. Va. 167; Crumlish's Adm'r v. Central Imp. Co., 38 W. Va. 390, 18 S. E. 456, 23 L. R. A. 120, 45 Am. St. Rep. 872; McCreery v. Davis, 44 S. C. 195, 22 S. E. 178, 28 L. R. A. 655, 51 Am. St. Rep. 794; Davis v. Smith, 5 Ga. 274, 47 Am.

seems to be well settled," says the supreme court of Nebraska, "that the judgment of a state court, so authenticated, is conclusive upon the merits or subject-matter of the suit, but that it does not exclude such defenses as inquire into the jurisdiction of the court in which it was pronounced, or the right of the state itself to exercise authority over the person or the subject-matter of the suit, or to plead as a defense to an action on such judgment a release, payment, or limitation by common law prescription or statute, or fraud in obtaining the judgment." [225] Where suit is brought against two defendants, on a judgment rendered in a sister state, one of such defendants can plead a want of jurisdiction in the foreign court over his co-defendant.[226] The judgment of a state court may be collaterally questioned or attacked in a federal court sitting in the same state, for a want of jurisdiction over the subject-matter or of notice to the defendant, the same as if it were a judgment of a court of another state.[227] In Mississippi, it is held that a judgment rendered against a person after his death is void for want of jurisdiction; and since, in actions on judgments of other states, it is competent to deny the jurisdiction, it is admissible, for the purpose of defeating such action, to aver that the defendant was dead when the judgment was rendered.[228]

But there are sometimes cases in which the inquiry into the ques-

Dec. 279; Braswell v. Downs, 11 Fla. 62; Sammis v. Wightman, 31 Fla. 10, 12 South. 526; Miller v. Ewing, 8 Smedes & M. (Miss.) 421; Norwood v. Cobb, 15 Tex. 500; Redus v. Burnett, 59 Tex. 576; Morgan v. Morgan, 1 Tex. Civ. App. 315, 21 S. W. 154; Barrett v. Oppenheimer, 12 Heisk. (Tenn.) 298; Chicago, R. I. & P. Ry. Co. v. Campbell, 5 Kan. App. 881, 49 Pac. 321; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340; Spier v. Corll, 33 Ohio St. 236; Westcott v. Brown, 13 Ind. 83; Welch v. Sykes, 3 Gilman (Ill.) 197, 44 Am. Dec. 689; Bimeler v. Dawson, 4 Scam. (Ill.) 536, 39 Am. Dec. 430; Lawrence v. Jarvis, 32 Ill. 304; Zepp v. Hager, 70 Ill. 223; State v. Fleak, 54 Iowa, 429, 6 N. W. 689; Barlow v. Steel, 65 Mo. 611; Bradley v. Welch, 100 Mo. 258, 12 S. W. 911; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; Marr v. Wetzel, 3 Colo. 2; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; Greenzweig v. Strelinger, 103 Cal. 278, 37 Pac. 398; Bank of Chadron v. Anderson, 6 Wyo. 518, 48 Pac. 197.

[225] Eaton v. Hasty, 6 Neb. 419, 29 Am. Rep. 365. See, also, Wilcox v. Kassick, 2 Mich. 165.

[226] Gordon v. Mackay, 34 N. J. Law, 286.

[227] Swift v. Meyers (C. C.) 37 Fed. 37. And see Southern Ins. Co. of New Orleans v. Wolverton Hardware Co. (Tex. Sup.) 19 S. W. 615.

[228] Gerault v. Anderson, Walk. 30, 12 Am. Dec. 521.

tion of jurisdiction comes so close to an examination of the merits as to call for a nice discrimination. This is illustrated by the case of Rocco v. Hackett.[229] This was an action brought in New York upon a judgment rendered by a court in Massachusetts, in an action to which the defendant had appeared after being personally served with process. It appeared that the judgment sued on was itself rendered upon an earlier judgment against the same defendant in another court of Massachusetts. And the defendant offered to prove that he never had notice of the original action, was not a resident of Massachusetts, and was not served with process in that suit. But the court in New York refused to admit such evidence, for the reason that the merits of the judgment now in suit could not be inquired into again, and that although the courts of New York might have held the original judgment void, yet as the Massachusetts court had not done so, but had rendered a new judgment upon it, that new judgment must be considered as conclusive of the question.

§ 898. Requisites of Plea Denying Jurisdiction.

The defendant being at liberty, in an action on a judgment of another state, to impeach it for want of jurisdiction, as we have just shown, the rule is next to be stated that the plea denying the jurisdiction of the court must, by certain and positive averments, negative every fact from which the jurisdiction might arise.[230] Thus, allegations in a plea that a defendant, sued in one state on a judgment recovered against him in a court of another state, did not have his day in the latter court, or that the latter court did not have jurisdiction over him, are mere conclusions of law and bad in substance, even though they have the basis of an accompanying allegation that there was no service of summons in the action in which the judgment was rendered.[231] And so, an affidavit of defense in an action

[229] 2 Bosw. (N. Y.) 579.

[230] Welch v. Sykes, 3 Gilman (Ill.) 197, 44 Am. Dec. 689; Struble v. Malone, 3 Iowa, 586; Puckett v. Pope, 3 Ala. 552; Smith v. Rhoades, 1 Day (Conn.) 168; Barkman v. Hopkins, 11 Ark. 157; Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374; L'Engle v. Gates (C. C.) 74 Fed. 513; Sammis v. Wightman, 31 Fla. 10, 12 South. 526; Foshier v. Narver, 24 Or. 441, 34 Pac. 21, 41 Am. St. Rep. 874; Carpenter v. Ritchie, 2 Wash. St. 512, 28 Pac. 380.

[231] Sammis v. Wightman, 31 Fla. 10, 12 South. 526.

on a foreign judgment, which sets up that the defendant did not appear in the action, nor authorize an appearance for him by the attorney who filed his answer in the cause, is not sufficient.[232] So again, it is not sufficient for the defendant to answer that he was not a resident of the state where the judgment was rendered, that he had no agent there, and that he was not served with notice; for non constat that he did not voluntarily appear.[233] So, in a suit on a judgment obtained in another state against a domestic corporation, it was held to be not a good plea to allege that process was not served on any one authorized to act for it in the suit, for it may have had an office and transacted business in such foreign state and made the contract there, and the process may have been served on its president or other officer while in such state.[234] But where the defendant averred in his plea that he was not served with process, that he had no notice whatever of the existence of the suit, that he made no appearance to the action either in person or by attorney, and that when the suit was brought, as well as when the judgment was rendered, he was a non-resident of that state, the plea was held good and sufficient, the court saying, "we know of no other means by which the court could have acquired jurisdiction of his person." [235] So also the following plea was held good: "That the defendant was not served with process in the suit in which the said judgment was obtained; that he did not appear to said suit in person or by any duly authorized attorney; and that he was not resident or present within the jurisdiction of the court in which the said judgment was rendered

[232] Polk County Bank v. Fleming, 33 Wkly. Notes Cas. (Pa.) 75.

[233] Struble v. Malone, 3 Iowa, 586; Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374; Sammis v. Wightman, 31 Fla. 10, 12 South. 526. But where the plaintiff alleges that the judgment was rendered upon summons and complaint duly and personally served on defendant, an answer denying that any valid judgment was rendered, or that defendant appeared or authorized an appearance, has been thought sufficient as a plea of want of jurisdiction. Aultman, Miller & Co. v. Mills, 9 Wash. 68, 36 Pac. 1046.

[234] Moulin v. Trenton Mut. Life & Fire Ins. Co., 24 N. J. Law, 222.

[235] Barkman v. Hopkins, 11 Ark. 157. In an action on a foreign judgment, it is said that the answer sufficiently negatives jurisdiction of the court rendering the judgment by alleging that it was "without jurisdiction over the person of defendant, because he was not personally served with notice in said cause, nor did he enter an appearance personally or by attorney or otherwise." Minter v. Green (Ind. Ter.) 49 S. W. 48.

at any time pending the said suit, or when judgment was rendered therein; that A. & B. appeared in said suit for the defendant, but that neither they nor any other person or persons were ever authorized by the defendant to do so."[236] But where the answer alleged that the foreign court had no jurisdiction to render such judgment, but that it was rendered on a complaint which on its face disclosed that no cause of action existed, it was held that the answer did not allege want of jurisdiction, but only error in its exercise, and therefore a demurrer was rightly sustained.[237]

§ 899. Jurisdiction, if Impeached, may be Supported by Evidence.

The opinion has sometimes been expressed that, in an action on a judgment of a sister state, where the plea is nul tiel record, it is the proper practice for the court to determine the issue by inspection of the transcript of the record, and if the transcript fails to show that the court rendering the judgment had jurisdiction of the person of the defendant, it cannot be aided by other evidence.[238] But the more approved doctrine is that if the defendant traverses the fact of jurisdiction of his person, the plaintiff may produce extraneous evidence to show that jurisdiction in fact attached.[239] And if, in such an action, the record shows a certain kind of service (as by arrest of the defendant), expert testimony is admissible to show that by the usage and practice of the court rendering the judgment such service is sufficient to support the judgment, there being nothing in the statutes of that state inconsistent with such a service.[240]

[236] Ward v. Price, 25 N. J. Law, 225. And see Wissler v. Herr, 162 Pa. 552, 29 Atl. 862.

[237] Williams v. Renwick, 52 Ark. 160, 12 S. W. 331, 20 Am. St. Rep. 158.

[238] Kimball v. Merrick, 20 Ark. 12; Noyes v. Butler, 6 Barb. (N. Y.) 613. See, also, Zepp v. Hager, 70 Ill. 223.

[239] Knowles v. Logansport Gaslight & Coke Co., 19 Wall. 58, 22 L. Ed. 70; Sears v. Dacey, 122 Mass. 388; McDermott v. Clary, 107 Mass. 501; Stockwell v. McCracken, 109 Mass. 86; American Tube & Iron Co. v. Crafts, 156 Mass. 257, 30 N. E. 1024; Wilhelm v. Parker, 17 Ohio Cir. Ct. R. 234; Russell v. Butler (Tex. Civ. App.) 47 S. W. 406.

[240] Mowry v. Chase, 100 Mass. 79.

§ 900. Cases Refusing to Allow Contradiction of Record.

So far we have considered the case where the record of a judgment rendered in another state was silent or ambiguous on the subject of jurisdiction or contained no direct averment or finding of jurisdiction. But let us suppose that such a record recites the facts necessary to confer jurisdiction upon the court. Are such recitals then conclusive, or may they be contradicted, on a plea denying jurisdiction, by extrinsic evidence? It is familiar doctrine that a record is evidence of the highest nature, in fact of "uncontrollable verity," that it imports absolute truth, and can in no wise be contradicted or impeached in respect to its positive recitals. And it seems to have been clearly the intention of the constitution and of congress to give to the judicial proceedings of each state all the weight and dignity of a record in the other states. There was therefore much plausibility in the view (once very generally held, and still adhered to in a few modern cases) that in the case supposed the defendant must not be allowed to contradict the recitals of the record.[241] The applications of this doctrine to the various cases

[241] Lincoln v. Tower, 2 McLean, 473, Fed. Cas. No. 8,355; Dilworth v. Johnson (D. C.) 6 Fed. 459; Bradstreet v. Neptune Ins. Co., 3 Sumn. 600, Fed. Cas. No. 1,793; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Lapham v. Briggs, 27 Vt. 26; Farr v. Ladd, 37 Vt. 156; Hall v. Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356; Wetherill v. Stillman, 65 Pa. 105; Lance v. Dugan (Pa.) 13 Atl. 942; Miller v. Dungan, 35 N. J. Law, 389; Pritchett v. Clark, 4 Har. (Del.) 280; Westcott v. Brown, 13 Ind. 83; Welch v. Sykes, 3 Gilman (Ill.) 197, 44 Am. Dec. 689; Zepp v. Hager, 70 Ill. 223; Caughran v. Gilman, 72 Iowa, 570, 34 N. W. 423; Wilson v. Jackson, 10 Mo. 330; Wilcox v. Kassick, 2 Mich. 165. In the case of Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244, it was said: "Jurisdictional facts, such as the service of the writ and the like, are presumed, and conclusively presumed, in the case of a domestic court of general jurisdiction, unless the record itself shows the contrary; and we suppose the same would be true of a foreign judgment of the same character, were it not that a citizen here cannot by any process reach a foreign judgment, to get it reversed, without going to the foreign jurisdiction where the judgment was rendered, which is never required of our own citizens or inhabitants." And in Hall v. Williams, 6 Pick. (Mass.) 232, 239, 17 Am. Dec. 356, Chief Justice Parker observed: "In regard to the conclusiveness of such judgments to all intents and purposes, there is yet a question of considerable importance, which has been discussed and decided in almost every state of the Union in which there are printed reports of their judicial

arising in practice were stated in one of the Illinois decisions in the following terms: First, if the record of the judgment shows that the defendant was personally served with process, or personally appeared to the action, the record is conclusive, and he is estopped by it from denying that the court had jurisdiction of his person. Second, if the record does not show any service of process, nor notice to the defendant, nor appearance by him, the judgment is a mere nullity, and the record affords no presumption whatever.[242] Third, if the record shows a service of process, or a notice to the defendant, or an appearance for him, but not amounting, in either case, to personal notice or appearance, the record affords a presumption that the court had jurisdiction, but this presumption the defendant is at liberty to rebut.[243]

decisions; and the question is presented now by the issue taken on the second and third pleas to this action. The defendants, in answer to the declaration, say that neither of them was served with notice of the suit in which the judgment was rendered, nor appeared, nor authorized any one to appear for him in the action, and that F. was never an inhabitant of or resident in the state of Georgia. The plaintiffs reply that the defendants are estopped by the record to deny these facts, and the record being set forth on oyer, the defendants demur to the replication of estoppel. If it appeared by the record that the defendants had notice of the suit, or that they appeared in defense, we are inclined to think that it could not be gainsaid; for as we are bound to give full faith and credit to the record, the facts stated in it must be taken to be true judicially, and if they should be untrue by reason of mistake or otherwise, the aggrieved party must resort to the authorities where the judgment was rendered for redress, for he could not be allowed to contradict the record by a plea and by an issue to the country thereon. But if the record does not show any service of process or any appearance in the suit, we think he may be allowed to avoid the effect of the judgment here, by showing that he was not within the jurisdiction of the court which rendered it, for it is manifestly against first principles that a man should be condemned, either criminally or civilly, without an opportunity to be heard in his defense."

[242] This position, however, is contrary to most of the authorities, which hold that in the silence of the record, jurisdiction will be presumed. Supra, § 896.

[243] Bimeler v. Dawson, 4 Scam. (Ill.) 536, 39 Am. Dec. 430. In support of the third position taken in this case, see, also, Lincoln v. Tower, 2 McLean, 473, Fed. Cas. No. 8,355.

§ 901. Record may be Contradicted.

Notwithstanding the force of the reasoning in the cases just cited, there was much to be said on the other side. It is fair to infer that the constitution means no more than that full faith and credit shall be given to the valid and lawful judgments of the courts of a sister state. But if, in point of fact, the court had no jurisdiction of the defendant, the sentence which it assumed to pronounce is no judgment at all; it is a nullity. It is true that a record must be held incontrovertible. But in the absence of jurisdiction, the account of the court's proceedings is not a record, for those proceedings would be coram non judice. For the very purpose, therefore, of according due faith and credit to the judgment, it must first be ascertained whether the document purporting to be a record is in reality entitled to that character. Nor should recitals of jurisdiction be conclusive on this point. For if, actually, there was no jurisdiction, no greater force or credit can be given to such recitals than to any other part of the instrument. Their own credibility depends upon the antecedent question. In other words, a recital that the paper is a record does not make it one. It is true that in most of the states collateral impeachment of domestic judgments for want of jurisdiction is not allowed. But this is because the party has a more appropriate remedy, which is also easy and efficacious, by direct proceedings to have the judgment vacated or reversed. But this reason does not operate in the case of judgments recovered in one state against citizens of another. Besides the hardship and inconvenience that would be caused by denying all other remedy, it is familiar doctrine that the courts of a state will never compel their own citizens to resort to a foreign tribunal for relief which they themselves can accord.

These and similar considerations had weight with many of the state courts. And a great number of rulings were made (both before and after the federal decisions to be presently noticed) to the effect that, in an action on a judgment from another state, the defendant may always deny the jurisdiction of the court which rendered it, notwithstanding recitals in the record to the contrary.[244] Still this

[244] Carleton v. Bickford, 13 Gray (Mass.) 591, 74 Am. Rep. 652; Bodurtha v. Goodrich, 3 Gray (Mass.) 508; Wright v. Andrews, 130 Mass. 149; McDer-

body of authority grew up side by side with an almost equal volume of judicial opinion directly opposed to it in principle. And the consequent doubt and uncertainty in regard to this important question was not removed until the United States supreme court came to deal with the controversy, and put its authoritative construction upon the terms of the law governing it. In the first case in which the precise question fairly arose, that court decided that the inquiry into the jurisdiction could not be prevented by any recitals in the record. At the conclusion of a thoughtful and well reasoned opinion, in which the extant authorities were reviewed with much learning and judgment, Mr. Justice Bradley expressed himself as follows: "If it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statements could be used to prevent an inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith

mott v. Clary, 107 Mass. 501; Gilman v. Gilman, 126 Mass. 26, 30 Am. Rep. 646; Gleason v. Dodd, 4 Metc. (Mass.) 333; Phelps v. Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Dennison v. Hyde, 6 Conn. 508; Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244; Frothingham v. Barnes, 9 R. I. 474; Black v. Black, 4 Bradf. Sur. (N. Y.) 174; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Starbuck v. Murray, 5 Wend. (N. Y.) 148, 21 Am. Dec. 172; Kerr v. Kerr, 41 N. Y. 272; Shumway v. Stillman, 6 Wend. (N. Y.) 447; Latham v. Delany, 59 N. Y. Super. Ct. 37, 12 N. Y. Supp. 463; Price v. Schaeffer, 161 Pa. 530, 29 Atl. 279, 25 L. R. A. 699; Commonwealth v. Bolich, 18 Pa. Co. Ct. R. 401; Mitchell v. Garrett, 5 Houst. (Del.) 34; Kingsbury v. Yniestra, 59 Ala. 320; Norwood v. Cobb, 24 Tex. 551; League v. Scott (Tex. Civ. App.) 61 S. W. 521; Wood v. Wood, 78 Ky. 624; Chaney v. Bryan, 15 Lea (Tenn.) 589; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340; Kingsborough v. Tousley, 56 Ohio St. 450, 47 N. E. 541; Pond v. Simons, 17 Ind. App. 84, 45 N. E. 48; Pollard v. Baldwin, 22 Iowa, 328; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; Marx v. Fore, 51 Mo. 69, 11 Am. Rep. 432; Napton v. Leaton, 71 Mo. 358; Banister v. Weber Gas & Gasoline Engine Co., 82 Mo. App. 528; Aultman, Miller & Co. v. Mills, 9 Wash. 68, 36 Pac. 1046; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; Rape v. Heaton, 9 Wis. 328, 76 Am. Rep. 269; Kane v. Cook, 8 Cal. 449.

in a deed, which avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England and some of the states, it is true, are held to import absolute verity as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extra-territorial force. . . . . On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provisions of the fourth article of the constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."[245] The doctrine thus announced was soon afterwards re-affirmed in the same court, it being held that, although the record might show a return of the sheriff to the effect that the defendant had been personally served with process, yet the latter might deny and disprove it.[246] And the rule has been recognized and extended in later decisions of the court,[247] so that it may be now regarded as a fixed and settled principle, and one which of course is binding on the state tribunals. Before leaving this point it is necessary to remark that there is good authority for the proposition that if it appears affirmatively from the record of the judgment, and as a matter of adjudication, that the defendant had legal notice of the suit or duly authorized an appearance to be entered for him, then he is no longer at liberty to allege a want of jurisdiction.[248] The reason of this is obvious. In such a case, the question of jurisdiction would be one of the grounds of defense to the original action, there set up and adjudicated, and of course equally concluded with any other defense. And hence the principle which forbids a re-examination of the merits of the controversy would apply.

[245] Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897.

[246] Knowles v. Logansport Gaslight & Coke Co., 19 Wall. 58, 22 L. Ed. 70.

[247] Hall v. Lanning, 91 U. S. 160, 23 L. Ed. 271; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. And see Graham v. Spencer (C. C.) 14 Fed. 603.

[248] Gleason v. Dodd, 4 Metc. (Mass.) 333.

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[245] Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897.

[246] Knowles v. Logansport Gaslight & Coke Co., 19 Wall. 58, 22 L. Ed. 70.

[247] Hall v. Lanning, 91 U. S. 160, 23 L. Ed. 271; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565. And see Graham v. Spencer (C. C.) 14 Fed. 603.

[248] Gleason v. Dodd, 4 Metc. (Mass.) 333.

§ 902. Plea Contradicting Record must be Special.

In an action on a judgment of a sister state, if it appears on the face of the record that the court did have jurisdiction, extrinsic evidence to contradict it is not admissible under a general denial or the plea of nul tiel record. Defects appearing on the record may be taken advantage of under this plea, but if it is desired to contradict it, it must be done by a formal and special plea.[249] "The defendant may indeed negative the presumption by pleading and proof; he may show that the court which assumed to bind him had no authority over his person, and he may do this not only when the record is silent, but in opposition to its explicit entries or allegations; but if, instead of adopting this course, he confine himself to a plea of nul tiel record, and thus shut the plaintiff out from sustaining the record by extrinsic evidence, the judgment itself should be sufficient proof of its own validity." [250]

§ 903. Denying Authority of Attorney to Appear.

In several of the earlier cases it was held that when the record of a judgment in a sister state shows an appearance by attorney, it is not permitted to the defendant, when sued upon it, to deny that the court had jurisdiction. This position was rested on the general theory of the "absolute verity" of the record, and the constitutional doctrine that no pleas should be admitted against such a judgment except such as would have been available against it in the state where it was rendered.[251] But this view was never universally accepted, and the best modern cases have entirely repudiated it. So

[249] Hill v. Mendenhall, 21 Wall. 453, 22 L. Ed. 616; Bennett v. Morley, 10 Ohio, 100; Ferry v. Miltimore Elastic Steel Car-Wheel Co., 71 Vt. 457, 45 Atl. 1035, 76 Am. St. Rep. 787; Hoffheimer v. Stiefel, 17 Misc. Rep. 236, 39 N. Y. Supp. 714; Rice v. Coutant, 38 App. Div. 543, 56 N. Y. Supp. 351.

[250] Fritz v. Fisher, 5 Clarke (Pa.) 350.

[251] Field v. Gibbs, 1 Pet. C. C. 155, Fed. Cas. No. 4,766; Roberts v. Caldwell, 5 Dana (Ky.) 512; Edmonds v. Montgomery, 1 Iowa, 143. This was also the doctrine in Missouri (see Warren v. Lusk, 16 Mo. 102; Baker v. Stonebraker, 34 Mo. 172), until the decision in the case of Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897, after which the courts felt obliged to conform to the principles therein established. See Eager v. Stover, 59 Mo. 87.

that it may now be regarded as the settled rule that, in an action on such a judgment, if the record recites that the defendant appeared by attorney, this may well be conclusive proof that the attorney did appear for him, but it is only prima facie evidence that the attorney was authorized to appear for him, and the defendant is at full liberty to prove that such appearance was unauthorized or fraudulent, and consequently that there was no jurisdiction of his person.[252] A recent case in New York carries this rule to a point which seems to

[252] Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Hall v. Williams, 6 Pick. (Mass.) 232, 17 Am. Dec. 356; Shumway v. Stillman, 6 Wend. (N. Y.) 447; Ward v. Price, 25 N. J. Law, 225; Koonce v. Butler, 84 N. C. 221; Sherrard v. Nevius, 2 Ind. 241, 52 Am. Dec. 508; Boylan v. Whitney, 3 Ind. 140; Welch v. Sykes, 3 Gilman (Ill.) 197, 44 Am. Dec. 689; Thompson v. Emmert, 15 Ill. 416; Lawrence v. Jarvis, 32 Ill. 304; Baltzell v. Nosler, 1 Iowa, 588, 63 Am. Dec. 466; Gilman v. Gilman, 126 Mass. 26, 30 Am. Rep. 646; Kahn v. Lesser, 16 N. Y. Supp. 154; Home Friendly Soc. v. Tyler, 12 Pa. Co. Ct. R. 623; Hays v. Merkle, 67 Mo. App. 55; Harshey v. Blackmarr, 20 Iowa, 172, 89 Am. Dec. 520; Matx v. Fore, 51 Mo. 69, 11 Am. Rep. 432; Eager v. Stover, 59 Mo. 87. In the case of Bodurtha v. Goodrich, 3 Gray (Mass.) 508, Chief Justice Shaw remarked: "There is another question here, and that is, whether the defendant is conclusively bound by the entry of the name of an attorney on the docket, purporting to be an appearance for him, although it is true and susceptible of proof, that such entry was made by the accident or mistake of the attorney, or that, through some false and fraudulent representation made to the attorney, or other cause, in fact the attorney was never authorized to enter such appearance. It would certainly be very strange if an inhabitant of another state could thus be bound by a judgment given and recorded by a court having no jurisdiction, without any act or default of such party. . . . We think that where it appears that, as in the present case, the defendant was an inhabitant of another state, that no property of his was attached by trustee process or otherwise, and that he was not served with process, and the only ground to sustain the judgment is that he appeared by attorney, it is competent for the plaintiff in error to aver and prove that such attorney was never authorized to appear for him and thereby give the court jurisdiction. And even had the record gone further, and stated that such attorney was duly authorized and did appear, still it would be open to the plaintiff in error to aver and prove facts tending to show that the court had no jurisdiction of the cause, and therefore that they could make no record binding upon him, being a stranger, and such record would not be conclusive. It would be reasoning in a circle, and inconclusive, to say that the court had jurisdiction because it was shown by their record that the defendant appeared by attorney, and that they had authority to make such record, binding upon him, because they had jurisdiction."

be its extreme limit. There the defendant offered to prove that although the record recited his appearance by attorney, yet such appearance was wholly unauthorized. But it appeared that he had already moved, in the court which rendered the judgment, to have it set aside on that identical ground, that the motion was made upon affidavits and a full hearing had, but that it was decided against him. Nevertheless it was held that he was not prevented from raising the question of jurisdiction when sued in the courts of another state upon such judgment, nor from proving such facts as would support his contention.[253] If the defendant may thus show that the appearance was unauthorized, he may of course show that the authority was special or limited. Thus the recital of the record may be explained by proof that the attorney was not empowered to submit the defendant to the jurisdiction of the court, but only to plead to the jurisdiction.[254] So also, where the judgment was against the plaintiff for costs, and he is sued upon it in another state, he may defend by showing that he gave no authority to institute the suit and had no knowledge thereof before judgment was rendered.[255] But it cannot be shown, against such a judgment, that the attorney who had entered an appearance for the defendant in the original action had subsequently, without the consent of the latter, withdrawn such appearance after issue joined and several continuances of the cause, and that the counsel who afterwards appeared did so without any authority. For this would not invalidate the previous action of the counsel who was duly employed, and the latter's withdrawal of appearance would not put the party for whom he appeared out of court.[256]

§ 904. Jurisdiction by Attachment of Property.

Most of the cases in which the effect and validity of judgments from another state have been called in question have presented instances of an attempted exercise of jurisdiction over persons who were not citizens or residents of the state. And in most of the states,

[253] Howard v. Smith, 35 N. Y. Super. Ct. 131.
[254] Graham v. Spencer (C. C.) 14 Fed. 603.
[255] Watson v. New England Bank, 4 Metc. (Mass.) 343.
[256] Wilson v. Hilliard (Pa.) 5 Atl. 258.

statutes exist which authorize the institution of proceedings against such persons upon the attachment and seizure of property belonging to them and found within the territory, together with some species of constructive or substituted service of process. We have therefore to consider the extent of the jurisdiction thus acquired, to what purposes it may be directed, and how the resultant judgment will be regarded in other states. Now in the first place, it is not denied (indeed it is familiar doctrine) that the existence of property, either real or personal, within the limits of a state, gives to that state the dominion and jurisdiction over it, to the extent of regulating its transfer, controlling its use and disposition, subjecting it to process and execution, and devoting it to the satisfaction of the just claims of its own citizens.[257] So far it is immaterial whether the owner of the property be a citizen or a foreigner, a resident or absentee. And since such proceedings, as far as concerns the particular property seized, are substantially in rem, they do not need the support of an actual and personal notice to the owner, but such notice may be merely constructive. On the other hand, as we shall see more fully in the succeeding sections, no state can extend its jurisdiction over a person who is not a resident of such state and not within its limits at the time, and who does not appear or authorize an appearance, so as to render a judgment or decree which shall be binding on him personally. For that purpose, constructive or substituted service is of no avail. As a result of these two doctrines, the rule must be that if jurisdiction in an action is obtained against a non-resident by attachment of his property only, the judgment rendered thereon will bind the property attached and justify its disposition under execution, but beyond that it will have no extraterritorial force or validity whatever. And to this proposition the authorities unanimously agree.[258] It follows from this that a judg-

[257] Story, Confl. Laws, §§ 549-551.

[258] Green v. Van Buskirk, 7 Wall. 139, 19 L. Ed. 109; Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931; Galpin v. Page, 18 Wall. 350, 21 L. Ed. 959; Pennoyer v. Neff, 95 U. S. 725, 24 L. Ed. 565; Thompson v. Emmert, 4 McLean, 96, Fed. Cas. No. 13,953; McVicker v. Beedy, 31 Me. 314, 50 Am. Dec. 666; Young v. Ross, 31 N. H. 201; Woodruff v. Taylor, 20 Vt. 65; Price v. Hickok, 39 Vt. 292; McDermott v. Clary, 107 Mass. 501; Kilburn v. Woodworth, 5 Johns. (N. Y.) 37, 4 Am. Dec. 321; Fenton v. Garlick, 8 Johns. (N. Y.)

ment founded upon attachment of property, affecting to bind not only the property attached but also the person of a defendant not a citizen of the state or within its precincts at the time, is to be treated as a nullity by a court in another state which is called on to enforce it

194; Bates v. Delavan, 5 Paige (N. Y.) 299; Robinson v. Ward's Ex'rs. 8 Johns. (N. Y.) 86, 5 Am. Dec. 327; Pawling v. Willson, 13 Johns. (N. Y.) 192; Bartlett v. Spicer, 75 N. Y. 528; Phelps v. Holker, 1 Dall. (Pa.) 261, 1 L. Ed. 128; Steel v. Smith, 7 Watts & S. (Pa.) 447; Miller v. Dungan, 36 N. J. Law, 21; Ward v. McKenzie, 33 Tex. 297, 7 Am. Rep. 261; Rogers v. Coleman, Hardin (Ky.) 418, 3 Am. Dec. 733; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; Pelton v. Platner, 13 Ohio, 209, 42 Am. Dec. 197; Arndt v. Arndt, 15 Ohio, 33; Melhop v. Doane, 31 Iowa, 397, 7 Am. Rep. 147; Chamberlain v. Faris, 1 Mo. 517, 14 Am. Dec. 304; Jones v. Spencer, 15 Wis. 583; Story, Confl. Laws, § 549.

In the important case of Pennoyer v. Neff, supra, this subject was considered with much care and attention, and we quote the following language of Field, J., as a clear exposition of the most approved doctrine on the point in question. "Substituted service by publication," said the learned judge, "or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners; or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a non-resident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the non-resident to appear. Process sent to him out of the state and process published within it are equally unavailing in proceedings to establish his personal liability. . . . In all the cases brought in the state and federal courts, where attempts have been made, under the act of congress, to give effect in one state to personal judgments rendered in another state against non-residents, without service upon them, or upon substituted service by publication, or in some other form, it has been held, without an exception so far as we are aware, that such judgments were without any binding force, except as to property or interests in property within

by action, so far as concerns any personal liability of the defendant, although it would bind his person in the courts and by the laws of the state in which it was rendered.[259] It follows also that if the property attached is not sufficient to satisfy the plaintiff's claim, the judgment will be no bar to another action in another state for the balance of the original demand.[260] Further, the recitals of a judgment in rem, obtained in a sister state without personal service and upon publication only, and where the defendant did not appear to the suit, are not evidence of debt in a separate action pending in another state between the same parties.[261] A personal judgment for costs may not be rendered against the defendant, on default, in an action of trespass to try title to real estate, if citation was served on him by publication, as a non-resident, and not personally, and if such judgment be entered, it cannot be enforced against other property of the defendant even within the jurisdiction of the court.[262] But a suit to enforce the lien of a mortgage by a sale of the property is in the nature of a proceeding in rem, and in case the mortgagor or his successor in interest is a non-resident, or not found, so that he cannot be personally served with process in the state, the court may decree a sale of the property on such substituted or constructive service of process on the defendant as the legislature may provide.[263] But in such a case, it is apprehended, a personal

the state, to reach and affect which was the object of the action in which the judgment was rendered, and which property was brought under the control of the court in connection with the process against the person. The proceeding in such cases, though in the form of a personal action, has been uniformly treated, where service was not obtained, and the party did not voluntarily appear, as effectual and binding merely as a proceeding in rem, and as having no operation beyond the disposition of the property, or some interest therein. And the reason assigned for this conclusion has been that which we have already stated,—that the tribunals of one state have no jurisdiction over persons beyond its limits, and can inquire only into their obligations to its citizens when exercising its conceded jurisdiction over their property within its limits."

259 Steel v. Smith, 7 Watts & S. (Pa.) 447; Miller v. Dungan, 36 N. J. Law, 21, and other cases cited in preceding note.

260 National Bank v. Peabody, 55 Vt. 492, 45 Am. Rep. 632.

261 Iles v. Elledge, 18 Kan. 296.

262 Freeman v. Alderson, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. Ed. 372.

263 Swift v. Meyers (C. C.) 37 Fed. 37.

judgment or decree for the deficiency would have no extra-territorial validity. Further, the jurisdiction of a state includes the power to appropriate debts, due by its citizens to non-residents, to the payment of debts due by such non-residents to other citizens of the state, and to prescribe the remedial means or judicial proceedings by which such appropriations may be made. And when the proceedings in an action for that purpose are in conformity with the laws of the state, they are final and conclusive upon the non-resident, so far as the fund itself is concerned, although he was not served with process and did not appear in the action.[264] Finally, the doctrine that the judgment in an attachment proceeding creates no personal liability against the defendant, outside the state where rendered, applies only where the proceeding is strictly in rem, and not where there was personal service of process on the defendant or an appearance entered by him.[265]

§ 905. Extra-Territorial Service of Process.

It is well settled that extra-territorial service of process confers no jurisdiction for the rendition of a valid personal judgment. A citizen of one state cannot be compelled to go into another state, and there litigate an action pending against him, merely by the service of a writ upon him in his own state. For no state can send its process into another state. The moment it crosses the border it loses the character of judicial process. True, the personal service of it gives the defendant actual notice of the suit, and in this it differs from service by publication. But this difference is immaterial for jurisdictional purposes. In that respect both methods of citation stand on the same footing. Hence service of process in another state, though authorized by the laws of the forum, gives no authority to render a personal judgment which will have any force or vitality beyond the state where the action was brought.[266] But of course if

[264] Campbell v. Home Ins. Co., 1 S. C. 158.

[265] Payne v. O'Shea, 84 Mo. 129.

[266] Parrot v. Alabama Gold Life Ins. Co., 4 Woods, 353, 5 Fed. 391; Ewer v. Coffin, 1 Cush. (Mass.) 23, 48 Am. Dec. 587; Cross v. Armstrong, 44 Ohio St. 613, 10 N. E. 169; Reber v. Wright, 68 Pa. 471; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Folger v. Columbian Ins. Co., 99 Mass. 267, 96 Am.

the defendant, after being so served, files an answer in the suit and sets up a defense on the merits, the judgment rendered will be valid and conclusive.[267]

§ 906. Constructive Service on Non-Residents.

A judgment rendered in one state against a resident of another state, who was not served with process and did not appear in the action, either personally or by an authorized attorney, is not valid or binding out of the state where rendered, although the attempt to acquire jurisdiction may have been in a mode (e. g., publication of summons in a newspaper) recognized as sufficient and valid by the laws of that state; and such absence of jurisdiction will defeat an action on such judgment in any other state.[268] As remarked by

Dec. 747; Howard v. Coon, 93 Mich. 442, 53 N. W. 513; Garner v. Garner, 56 Md. 127; Franz Falk Brewing Co. v. Hirsch, 78 Tex. 192, 14 S. W. 450.

[267] Jones v. Jones, 36 Hun (N. Y.) 414.

[268] D'Arcy v. Ketchum, 11 How. 165, 13 L. Ed. 648; Bischoff v. Wethered, 9 Wall. 812, 19 L. Ed. 829; Cooper v. Reynolds, 10 Wall. 308, 19 L. Ed. 931; Thompson v. Whitman, 18 Wall. 457, 21 L. Ed. 897; Knowles v. Logansport Gaslight & Coke Co., 19 Wall. 58, 22 L. Ed. 70; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Empire Tp. v. Darlington, 101 U. S. 87, 25 L. Ed. 878; Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101; Thompson v. Emmert, 4 McLean, 96, Fed. Cas. No. 13,593; McVicker v. Beedy, 31 Me. 314, 1 Am. Rep. 666; Whittier v. Wendell, 7 N. H. 257; Rangeley v. Webster, 11 N. H. 299; Rider v. Alexander, 1 D. Chip. (Vt.) 275; Newcomb v. Peck, 17 Vt. 302, 44 Am. Dec. 340; Price v. Hickok, 39 Vt. 292; Woodward v. Tremere, 6 Pick. (Mass.) 354; Phelps v. Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Carleton v. Bickford, 13 Gray (Mass.) 591, 74 Am. Dec. 652; Rand v. Hanson, 154 Mass. 87, 28 N. E. 6, 12 L. R. A. 574, 26 Am. St. Rep. 210; Wood v. Watkinson, 17 Conn. 500, 44 Am. Dec. 562; Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Rathbone v. Terry, 1 R. I. 73; Frothingham v. Barnes, 9 R. I. 474; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; New York Life Ins. Co. v. Aitkin, 125 N. Y. 660, 26 N. E. 732; Reber v. Wright, 68 Pa. 471; Scott v. Noble, 72 Pa. 115, 13 Am. Rep. 663; Mitchell v. Garrett, 5 Houst. (Del.) 34; Expressman's Mut. Ben. Ass'n v. Hurlock, 91 Md. 585, 46 Atl. 957, 80 Am. St. Rep. 470; Stewart v. Northern Assur. Co., 45 W. Va. 734, 32 S. E. 218, 44 L. R. A. 101; Davidson v. Sharpe, 28 N. C. 14; Miller's Ex'rs v. Miller, 1 Bailey (S. C.) 242; Howell v. Gordon, 40 Ga. 302; Dearing v. Bank of Charleston, 5 Ga. 497, 48 Am. Dec. 300; Ponce v. Underwood, 55 Ga. 601; Feltus v. Starke, 12 La. Ann. 798; Rogers v. Coleman, Hardin, 418, 3 Am. Dec. 733; Williams v. Preston, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; Carlin v. Taylor, 7 Lea (Tenn.) 666; Barkman v. Hopkins, 11 Ark. 157; Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Arndt v. Arndt, 15 Ohio,

a learned judge in Kentucky: "Although the federal constitution declares, in effect and according to the established interpretation of it here, that a judgment rendered in one of the states of the Union shall be as effectual as it may be where it was pronounced, yet it has been decided that, as no state has jurisdiction, legislative or judicial, over any other persons than its own citizens and foreigners within its sovereign limits, a judgment or decree in personam against a citizen of another state, without actual service of process or voluntary appearance, is not made binding and conclusive in any other state by the federal constitution." [269] So also the supreme court of the United States declares that a judgment or decree which is merely in personam "can only be supported, against a person who is not a citizen or resident of the state in which it is rendered, by actual service upon him within its jurisdiction, and constructive service by publication in a newspaper is not sufficient. The courts of the state might perhaps feel bound to give effect to the service made as directed by its statutes. But no court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court. The judgment would be allowed no force in the courts of any other state; and it is of no greater force, as against a citizen of another state, in a court of the United States, though held within the state in which the judgment was rendered." [270] A judgment so rendered, therefore, will be regarded in other states as void and a mere nullity; it may be impeached collaterally or otherwise; it forms no bar to a recovery sought in opposition to it, nor any foundation for a title claimed under it.[271] Even in the state where the action is brought, according to the best authorities, a judgment rendered upon merely constructive service has not sufficient vitality to justify the courts

33; Welch v. Sykes, 3 Gilman (Ill.) 197, 44 Am. Dec. 689; Zepp v. Hager, 70 Ill. 223; Winston v. Taylor, 28 Mo. 82, 75 Am. Dec. 112; Outhwite v. Porter, 13 Mich. 533; Tyler v. Peatt, 30 Mich. 63; Jones v. Spencer, 15 Wis. 583; Kane v. Cook, 8 Cal. 449. Compare Clinch Valley Coal Co. v. Tonkin, 9 Kulp (Pa.) 494; Williams v. Williams, 53 Mo. App. 617.

[269] Whiting v. Johnson, 5 Dana (Ky.) 390.

[270] Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101.

[271] Eaton v. Badger, 33 N. H. 228; Carleton v. Washington Ins. Co., 35 N. H. 162.

in seizing and selling property of the non-resident debtor, found within the state, for its satisfaction. If the action was begun by an attachment of property, so as to be substantially in rem, the courts will be justified in ordering the disposition of that property. But to warrant the subjection of any other property, although it lies within the same territory, to the claims of creditors, there must first be established a valid personal liability of the defendant, and that can never result from a sentence based on nothing more than constructive citation.[272]

§ 907. Constructive Service on Residents.

"Each state has the right to prescribe by law how its citizens shall be brought into its courts. And whatever conflict there may be in some of the earlier cases on the subject, we think it is now well settled that if process be served upon the defendant according to the laws of the state of which he is a resident, and judgment be afterwards rendered against him, such a judgment is as binding between the parties, in this state, when relied on as a bar to the prosecution of a second suit, upon the same cause of action, as it is in the state where it was rendered." [273] Consequently, if the defendant was subject to the jurisdiction of the state where the action was brought, and process was served upon him in accordance with its laws,—as, by leaving a copy of the summons at his usual residence,—the judgment is presumably valid, although he was in fact temporarily absent from the state.[274] But it has also been held that the judgment is liable to be impeached, in another state, by proof that the defendant was not domiciled in the state where it was rendered, nor subject to its laws, or that the judgment is not valid according to those

[272] Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

[273] Harryman v. Roberts, 52 Md. 64, 75. And see also Henderson v. Stanford, 105 Mass. 504, 7 Am. Rep. 551; Gillespie v. Commercial Mut. Marine Ins. Co., 12 Gray (Mass.) 201, 71 Am. Dec. 743; Stewart v. Schaeffer, 33 Wkly. Notes Cas. (Pa.) 365; Firemen's Ins. Co. v. Thompson, 155 Ill. 204, 40 N. E. 488, 46 Am. St. Rep. 335; Green v. Equitable Mut. Life & Endowment Ass'n, 105 Iowa, 628, 75 N. W. 635; Hamill v. Talbott, 72 Mo. App. 22.

[274] Cassidy v. Leitch, 2 Abb. N. C. 315; Huntley v. Baker, 33 Hun (N. Y.) 578; Biesenthall v. Williams, 1 Duv. (Ky.) 329, 85 Am. Dec. 629.

laws.[275] And some few cases, in opposition to the opinion of the majority, hold that, even in the case of its own citizens or residents, a state cannot rightfully substitute a merely constructive service for actual personal citation.[276]

§ 908. Voluntary Appearance of Non-Resident.

Where suit is brought against a non-resident defendant, and the service of process is by publication, or in some other mode not amounting to personal citation, yet if he voluntarily appears and defends the action, the court acquires complete jurisdiction of his person, and the judgment is valid and binding alike in the state where rendered, in the domicile of the defendant, and in all other courts.[277] On the same principle, one who prosecutes an appeal from a judgment of a nisi prius court of a sister state to the supreme court of that state, and who submits himself to the jurisdiction of the appellate tribunal, cannot impeach its judgment, in an action brought thereon in another state, on the ground that the nisi prius court had never obtained jurisdiction of his person, as the judgment of the supreme court merges that of the lower court.[278] So a judgment rendered by a court in Massachusetts, upon a writ served upon the defendant personally in that jurisdiction, where he appeared and pleaded to the merits, is entitled to full faith and credit in the courts of Maine, although, at the time of the service of the writ, both the parties were citizens of the last named state.[279]

§ 909. Defendant Decoyed into Another State.

In a case where the defendant, residing in Iowa, was induced, by means of false pretenses or representations, to go into Illinois, the

[275] Cassidy v. Leitch, 2 Abb. N. C. (N. Y.) 315.

[276] Bowler v. Huston, 30 Grat. (Va.) 266, 32 Am. Rep. 673. And see Ambaugh v. Exchange Bank, 33 Kan. 100, 5 Pac. 384.

[277] Bellows v. Ingham, 2 Vt. 575; Harbin v. Chiles, 20 Mo. 314. See, also, Randolph v. Keller, 21 Mo. 557; Hubbard v. American Inv. Co. (C. C.) 70 Fed. 808; Mutual Nat. Bank of New Orleans v. Moore, 50 La. Ann. 1332, 24 South. 304.

[278] Roach v. Privett, 90 Ala. 391, 7 South. 808, 24 Am. St. Rep. 819; Carpenter v. Ritchie, 2 Wash. St. 512, 28 Pac. 380, 26 Am. St. Rep. 877.

[279] Cleaves v. Lord, 43 Me. 290.

plaintiff thus designing to get service upon him, and in pursuance of such service a judgment was taken against him, which judgment was afterwards made the basis of an action in the courts of Iowa, it was there held that the jurisdiction so attaching was fraudulently obtained and would vitiate the judgment, and that the defendant might plead the fraud in bar of the subsequent action in Iowa. Said the court: "As we entertain no doubt that a court of Illinois would, if the facts alleged in this answer were proved, perpetually enjoin the collection of this judgment, we are clearly of the opinion that the defense here interposed should bar a recovery thereon in our own courts."[280] But some of the decisions rendered elsewhere on similar facts incline to the view that the defendant ought to apply to the court where the action is pending to have the proceedings set aside, on the ground of an abuse of its process, and that if he neglects to do this, and the action proceeds to judgment, he will be bound by the result in spite of the fraud practised upon him.[281] Other cases hold that his remedy is to bring suit against the persons conspiring to lure him into the foreign jurisdiction.[282] However this may be, it should be observed that there must be an actual fraud or trick put upon the defendant. A mere request to him to go to the other state and defend a suit in attachment actually pending there, is not a fraudulent device.[283]

§ 910. Non-Resident Corporations.

The principles stated in the preceding sections in relation to the acquisition of jurisdiction over non-resident defendants apply with the same force to foreign corporations as to natural persons.[284] A

[280] Dunlap v. Cody, 31 Iowa, 260, 7 Am. Rep. 129; Duringer v. Moschino, 93 Ind. 495; Pilcher v. Graham, 18 Ohio Cir. Ct. R. 5. An affidavit of defense, in a suit on a foreign judgment, which alleges that the defendant was fraudulently enticed into the state where the judgment was rendered, for the purpose of getting service on him, but no defense on the merits, is insufficient. Luckenbach v. Anderson, 47 Pa. 123.

[281] Steele v. Bates, 2 Aikens (Vt.) 338, 16 Am. Dec. 720; Townsend v. Smith, 47 Wis. 623, 3 N. W. 439, 32 Am. Rep. 793; Peel v. January, 35 Ark. 331, 37 Am. Rep. 27.

[282] Cook v. Brown, 125 Mass. 503, 28 Am. Rep. 259.

[283] Duringer v. Moschino, 93 Ind. 495.

[284] St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Ward

corporation is a resident of the state which creates it, and if sued in the courts of a different state, jurisdiction over it can only be acquired in some mode equivalent to personal service of process on an individual. But as an individual may submit himself to the jurisdiction of a foreign court, by accepting service of process within its territorial bounds, so may also a corporation, by having an officer or agent, authorized to accept service, in a foreign state where it does business. And indeed many of the states make the appointment of such a resident officer or agent a condition to the admission of certain classes of corporations to transact business within their borders. Hence when a corporation chartered in one state is sued in another, and service is there made upon a resident agent of the company who is authorized to receive service of process on its behalf, jurisdiction attaches, and the judgment in the action will be entitled to full faith and credit in the state where the corporation is chartered.[285] But it is a well established rule of interstate or international law that the courts of another state will not receive, as evidence of a foreign judgment, in a suit brought upon it, any record thereof which does not show on its face that the defendant, if a foreign corporation, was doing business in that state. This is a substantive jurisdictional averment that must affirmatively appear, and not be left to any inference from the bare return of the officer that he has served an "agent" of the company.[286] A judgment rendered against a corporation in another state, after its dissolution according to law in the state which created it, is a nullity, and does not come within the constitutional provision requiring full faith and credit to be given to interstate judgments.[287]

v. Connecticut Pipe Mfg. Co., 71 Conn. 345, 41 Atl. 1057, 42 L. R. A. 706, 71 Am. St. Rep. 207.

[285] Lafayette Ins. Co. v. French, 18 How. 404, 15 L. Ed. 451.

[286] Henning v. Planters' Ins. Co. (C. C.) 28 Fed. 440; Hazeltine v. Mississippi Val. Fire Ins. Co. (C. C.) 55 Fed. 743. And see Cunningham v. Spokane Hydraulic Co., 18 Wash. 524, 52 Pac. 235.

[287] In re Norwood, 32 Hun (N. Y.) 196; Rodgers v. Adriatic Fire Ins. Co. 148 N. Y. 34, 42 N. E. 515.

§ 910a. Non-Resident Stockholders of Domestic Corporations.

Where a judgment against a corporation is sought to be enforced against a stockholder resident in another state than that in which the judgment was recovered, the conclusive effect of the judgment will depend upon the law of the state wherein the judgment was rendered. If, by that law, a judgment against a corporation is binding on its stockholders, then the same conclusive effect must be given to it in every other state where an action is brought against a stockholder; and the only defenses which a stockholder can make against the judgment, when sued in the state of his own residence, are such as he could make in the courts of the state where the judgment was recovered.[288] So when a court having jurisdiction over an insolvent corporation makes a decree ascertaining its assets and liabilities and ordering an assessment against the members or stockholders, to raise the sum necessary to discharge the liabilities, if the decree, in that state, is conclusive against the members though they were not parties to the action, then it is equally conclusive against a member who is sued in another state to recover his share of the assessment.[289] But, according to the doctrine of the United States supreme court, an order of a court making a call or assessment upon all stockholders of a corporation who have not paid their shares in full, is merely such a call as the directors might have made before the matter was brought within the court's jurisdiction, and is not a judgment against any particular stockholder, so as to be entitled to "full faith and credit" in the courts of another state, where an action is brought against a stockholder to recover the amount of

[288] Hancock Nat. Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619, reversing s. c., 20 R. I. 466, 40 Atl. 341. As to the general rule concerning the binding effect of a judgment against a corporation as evidence against its stockholders, see supra, § 583.

[289] Mutual Fire Ins. Co. v. Phœnix Furniture Co., 108 Mich. 170, 66 N. W. 1095, 34 L. R. A. 694, 62 Am. St. Rep. 693; Tompkins v. Blakey, 70 N. H. 584, 49 Atl. 111. The rule is the same in regard to a decree or order levying an assessment upon the premium notes of the members of a mutual insurance company. Stevens v. Hein, 37 App. Div. 542, 55 N. Y. Supp. 491; Parker v. Stoughton Mill Co., 91 Wis. 174, 64 N. W. 751, 51 Am. St. Rep. 881. But compare Parker v. Lamb & Sons, 99 Iowa, 265, 68 N. W. 686, 34 L. R. A. 704.

the assessment on his shares; and in such action the defendant is entitled to rely on any defenses which he might have to an action upon the contract of subscription.[290]

§ 911. Irregularities in Service.

If the defendant was present within the territorial jurisdiction of the court when proceedings were begun against him, and process was there and then served upon him, no mere irregularity in such service, unless it was so radical as to deprive it of all citatory effect, can be set up against the judgment ensuing thereon in a suit upon such judgment in another state.[291]

§ 912. Continuation of Jurisdiction.

Where a court has acquired full jurisdiction of a cause, it retains it until the cause is finally determined. The exercise of the jurisdiction may be suspended, but the jurisdiction itself is never suspended. When, therefore, a court which still retains jurisdiction, but has suspended the exercise of it, assumes again to exercise its jurisdiction, its action is within its power and cannot be collaterally impeached. And where, in the case of a foreign judgment, it does not appear by the record that any notice was given to the party affected by the action of the court in thus resuming its jurisdiction, it will be presumed that, according to the practice of the court, no such notice was necessary, or that, if necessary, it was in fact given.[292] Where a judgment is rendered against a party who is fully within the jurisdiction of the court, and an appeal is taken after he has removed from the state, the appellate court has jurisdiction to proceed with the case, notwithstanding there can be no personal service of the process or notice of appeal.[293] So in cases where a scire

[290] Great Western Tel. Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810, 40 L. Ed. 986.

[291] Jardine v. Reichert, 39 N. J. Law, 165; Laing v. Rigney, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525; Greenzweig v. Strelinger, 103 Cal. 278, 37 Pac. 398; supra, vol. 1, §§ 223, 224.

[292] Sanford v. Sanford, 28 Conn. 6.

[293] Nations v. Johnson, 24 How. 195, 16 L. Ed. 628; Cone v. Hooper, 18 Minn. 531 (Gil. 476.) Compare Meyer v. Hartman, 14 Mo. App. 130.

facias is to be regarded as a continuation of the original action and not as a new suit, a judgment on the scire facias against a non-resident who was not served with notice of that proceeding and did not appear, will be held good in the courts of another state, provided the court had jurisdiction over him in the original suit.[294] So again, a judgment founded on a recognizance entered in the court of a state on the return of two successive writs of scire facias nihil habet will be regarded as valid and conclusive in another state. The proceeding is not coram non judice, inasmuch as the act of confessing the debt of record gives jurisdiction to the court over the person of the conusor.[295]

[294] Adams v. Rowe, 11 Me. 89, 25 Am. Dec. 266. See, also, Delano v. Jopling, 1 Litt. (Ky.) 117; Poorman v. Crane's Adm'r, Wright (Ohio) 347. But compare Robinson v. Ward's Ex'rs, 8 Johns. (N. Y.) 86, 5 Am. Dec. 327; Holt v. Alloway, 2 Blackf. (Ind.) 108.

[295] Eisasser v. Haines, 52 N. J. Law, 10, 18 Atl. 1095. In this case, in the course of a long and well-considered opinion, Beasley, C. J., observed: "The inquiry therefore arises, and it involves the entire issue now before the court, how was it that judgment could go against a conusor who had not been served with the scire facias? The answer is that by the form of the procedure, of which the writs of scire facias formed a part, the conusor voluntarily made himself a party to the proceeding. He went into court and confessed a debt subject to a condition, with the knowledge that if he absented himself from the jurisdiction a judgment might be taken against him on the return of two unserved writs of scire facias. Such was the legal effect of the act done by him; and, in intendment of law, he was held to have assented to such effect. If, when he confessed the debt, he had expressly consented, in pursuance of a local statute, to the entry of a final judgment of this nature on the return of two unserved writs of scire facias, it is presumed it would not be contended that a judgment entered in accordance with such stipulation would not have been of unquestionable validity; and yet, as he is chargeable with the knowledge, when he entered into this recognizance, that such result would obtain, according to the laws then in force, the tacit assent to such procedure, that is necessarily to be implied, wants but little of the force that would have resided in such supposed positive agreement. Nor is there any hardship which can arise out of such an interpretation of this legal procedure. If the conusor has any defense which he desires to interpose to the movement to enter judgment against him, he has his day in court for that purpose; for he is aware that he has, to that end, until the return of the second writ of scire facias, and, by the exercise of ordinary diligence, he can keep himself informed with respect to the running of such writs. In such a course of law, nothing is perceived of which the defendant can justly complain. At all events, it is a proceeding to which he has voluntarily sub-

§ 913. Judgment against Joint Defendants.

If two or more persons are made joint defendants to an action, but only a part of them are within the jurisdiction of the court or personally served with process within the state, a judgment rendered against all cannot be enforced outside of the state in which it was recovered.[296] Thus, in those states where the common law prevails, when a commercial firm is sued, it is necessary that process should be served on each member of the firm, and if one partner is not within the jurisdiction of the court, and is not served with process, and does not voluntarily appear and answer to the suit by himself or his attorney, the judgment against the partnership cannot be enforced against him out of the local jurisdiction.[297] Whether a judgment so rendered will be ex-territorially valid against the defendant upon whom process was served, is a question of more difficulty. It seems to be conceded that if the judgment would be binding on such defendant at home, it must be accorded the same effect in all other states.[298] But most of the courts which have dealt with the question adhere to the doctrine that a joint judgment is an entirety and if void as to one defendant is void as to all.[299] And they presume, in the absence of evidence to the contrary, that the law of a sister state is in this respect identical with their own or with the common law. Consequently, the presumption will be that such a judgment is void even as against the defendant who was duly served, and this presumption can only be removed by proof of the law of the other state authorizing the rendition of the judgment and making

mitted himself, and has thereby impliedly assented to it from its inception to its obvious conclusion."

[296] Frothingham v. Barnes, 9 R. I. 474; Bowler v. Huston, 30 Grat. (Va.) 266, 32 Am. Rep. 673; Rogers v. Burns, 27 Pa. 525; Duryee v. Hale, 31 Conn. 217; Stone v. Wainwright, 147 Mass. 201, 17 N. E. 301; Bonesteel v. Todd, 9 Mich. 371, 80 Am. Dec. 90.

[297] Board of Public Works v. Columbia College, 17 Wall. 521, 21 L. Ed. 687; Phelps v. Brewer, 9 Cush. (Mass.) 390, 57 Am. Dec. 56; Scott v. Bogart, 14 La. Ann. 261; Pickett v. Ferguson, 45 Ark. 177, 55 Am. Rep. 545; Hoffman v. Newell, 2 Misc. Rep. 570, 21 N. Y. Supp. 912.

[298] Conley v. Chapman, 74 Ga. 709; Holt v. Johnson, 50 Mo. App. 373. Compare Watson v. Steinau, 19 R. I. 218, 33 Atl. 4, 61 Am. St. Rep. 768.

[299] On this doctrine see supra, vol. 1, § 234.

it valid and binding on that defendant. Thus, the court in Massachusetts said of a judgment recovered in Maine: "If that court had no jurisdiction of one defendant, its judgment, being entire and unqualified, is, in the absence of any evidence of the law of Maine upon the subject, void against both." [300] And the same tribunal had before ruled that a judgment by default, in another state, against several defendants, only part of whom were served with process, directing that execution issue against the sole property of the defendant served and the joint property of all the defendants, would not support an action in Massachusetts, even against the defendant who was served, without proof that by the laws of the other state, such a judgment might properly be rendered.[301]

§ 914. Joint Debtor Acts.

In several of the states statutes have been enacted which provide that when an action is brought against two or more joint defendants, and only a part of them are served with process, the suit may nevertheless proceed, and if the plaintiff recover, judgment may be rendered against all the defendants, but so that execution shall only issue against their joint property and the separate property of the defendant served. As to the ex-territorial validity of a judgment so rendered, it is held that it must be accorded exactly the same force and effect when made the basis of an action, in another state, against the defendant who was originally served, and he cannot allege that the judgment is invalid, or claim the right to open again the merits of the controversy.[302] As to the defendant who was not served, the case is different. As the judgment has only a qualified validity as to him, and is not enforceable, even in the state where rendered, against his individual property, it is clear that it will constitute no bar to an action against him in any other state on the original cause

[300] Wright v. Andrews, 130 Mass. 149. See, also, Scott v. Noble, 72 Pa. 115, 13 Am. Rep. 663.

[301] Knapp v. Abell, 10 Allen, 485.

[302] Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242, 29 L. Ed. 535; Renaud v. Abbott, 116 U. S. 277, 6 Sup. Ct. 1194, 29 L. Ed. 629; Swift v. Stark, 2 Or. 97, 88 Am. Dec. 463.

of action.[303] But the joint debtor acts commonly provide that the judgment shall be conclusive on the defendant not served of the amount of the indebtedness but no further. Under this provision, it is held that when the plaintiff brings suit on the judgment in another state against both the defendants, he is not excused from the necessity of proving the original cause of action against the defendant who was not served. For the ground on which, consistently with established principles, such a judgment can be held conclusive as to the amount of the indebtedness against the defendant not served with notice, is, that by reason of the relation between them growing out of the joint character of their contract, the defendant served with notice may be regarded as authorized to act for the other defendant, so far as to bind him by his admission of the amount of the debt. When, therefore, there is a failure to prove, in the action founded on the judgment, a joint liability of the two defendants, the defendant not served with process cannot be regarded as affected to any extent by the judgment.[304] In New York it appears to be as yet an unsettled question whether a judgment obtained under the joint debtor act is evidence of the extent of the plaintiff's demand against the party not served, after his liability has been established by other evidence, or whether the effect of the judgment is merely to limit the amount of the claim so that no greater sum can be recovered.[305]

§ 915. Jurisdiction of Subject-Matter.

The opinion has been expressed that, in an action on a judgment of a sister state, the defendant cannot plead that the court rendering the judgment had no jurisdiction of the subject-matter of the suit: both the indebtedness and jurisdiction of the subject-matter are subjects of inquiry before the judgment is rendered and not after.[306] But this view is sustained neither by reason nor authority. That the jurisdiction of the subject may be inquired into is conclusively shown by the universally acknowledged rule that a judgment assum-

[303] Stone v. Wainwright, 147 Mass. 201, 17 N. E. 301; Shirley v. Shattuck, 13 Metc. (Mass.) 256.

[304] Duryee v. Hale, 31 Conn. 217.

[305] Oakley v. Aspinwall, 4 N. Y. 513.

[306] Hensley v. Force, 12 Ark. 756.

ing to dispose of or affect the title to lands situate outside the state is of no ex-territorial validity.[307] Besides, total want of jurisdiction of the matter decided has the same effect, in rendering the judgment a mere nullity, as total want of jurisdiction of the parties.[308] Hence it is rightly held that a decree in one state which adjudicates a matter not presented by the pleadings nor within the issue, can have no higher effect in another state than a judgment rendered in the courts of the latter under like conditions; that is, it must be treated as absolutely void.[309] In determining the validity of a judgment in this respect, the courts must look to the laws of the state where the judgment was rendered and be governed by the construction its own courts have given thereto.[310]

PART V. FRAUD AS GROUND OF IMPEACHMENT.

§ 916. Cases Allowing Defense of Fraud.

It has been made a question whether or not fraud practised in obtaining it can be pleaded to an action on a judgment rendered in a sister state. There are numerous expressions of opinion to be found in the books to the effect that such a plea is admissible.[311]

[307] Supra, § 872.

[308] Supra, vol. 1, §§ 240, 242.

[309] Reynolds v. Stockton, 43 N. J. Eq. 211, 10 Atl. 385, affirmed 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464.

[310] Stark v. Ratcliff, 111 Ill. 75.

[311] Pearce v. Olney, 20 Conn. 544; Brainard v. Fowler, 119 Mass. 262; Borden v. Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Andrews v. Montgomery, 19 Johns. (N. Y.) 162, 10 Am. Dec. 213; Shumway v. Stillman, 4 Cow. (N. Y.) 292, 15 Am. Dec. 374; Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; White v. Reid, 70 Hun, 197, 24 N. Y. Supp. 290; Buford v. Buford, 4 Munf. (Va.) 241, 6 Am. Dec. 511; Miller v. Leach, 95 N. C. 229; Sharman v. Morton, 31 Ga. 34; Davis v. Smith, 5 Ga. 274, 47 Am. Dec. 279; Engel v. Scheuerman, 40 Ga. 206, 2 Am. Rep. 573; Fletcher v. Rapp, 1 Smedes & M. Ch. (Miss.) 374; White v. Trotter, 14 Smedes & M. (Miss.) 30, 53 Am. Dec. 112; Norwood v. Cobb, 20 Tex. 588; Clark v. Ogilvie, 23 Ky. Law Rep. 552, 63 S. W. 429; Coffee v. Neely, 2 Heisk. (Tenn.) 304; Welch v. Sykes, 3 Gilman (Ill.) 197, 44 Am. Dec. 689; Bimeler v. Dawson, 4 Scam. (Ill.) 536, 39 Am. Dec. 430; Lawrence v. Jarvis, 32 Ill. 304; Holt v. Alloway, 2 Blackf. (Ind.) 108; Rogers v. Gwin, 21 Iowa, 58; Marx v. Fore, 51 Mo. 77, 11 Am. Rep. 432; Eaton v. Hasty, 6 Neb. 419, 29 Am. Rep. 365; Snyder v. Critchfield, 44 Neb. 66, 62 N. W. 306.

Some of the cases cited are direct and positive adjudications upon the question. But others are merely dicta upon this point, the topic being touched on in the course of general discussions of the validity and effect of judgments from other states. The latter (to which many more might be added) are of course of no direct authority upon the question, but they show that many of the courts have always taken it for granted that the defense of fraud might be interposed in such an action. In an early case in Vermont it was said: "It is a point settled that when debt is brought upon a foreign judgment rendered by default, the court will go into the consideration of such judgment, and if it appears that such judgment was surreptitiously obtained, they will not render judgment upon it." The judgment here spoken of was rendered in Connecticut against a non-resident, upon attachment of certain property which he now denied to be his.[312] So in a case in Arkansas it was held that a judgment of a sister state may be impeached on the ground of fraud practised in obtaining it. But this was a case where the defendant in such judgment went into chancery with a bill to enjoin its collection. It was therefore a direct proceeding to annul it, and one which would have been permissible in the state where the judgment was rendered.[313] According to another authority, such a judgment, if it was procured by fraud, may be impeached in the state where suit is brought upon it for the same reasons that would justify a court of equity in enjoining a judgment at law in the latter state.[314]

§ 917. Plea of Fraud, when Admissible.

The doctrine stated in the preceding section was never universally accepted. In many of the states the courts have adhered to the rule that the plea of fraud is not admissible in an action on a judgment from a sister state, unless it could be set up in the courts of the state rendering the judgment.[315] And this must now be regarded

[312] Waddams v. Burnham, 1 Tyler, 233.

[313] Conway v. Ellison, 14 Ark. 360.

[314] Turley v. Taylor, 6 Baxt. (Tenn.) 376.

[315] Barras v. Bidwell, 3 Woods, 5, Fed. Cas. No. 1,039; Granger v. Clark, 22 Me. 128; McDonald v. Drew, 64 N. H. 547, 15 Atl. 148; McRae v. Mattson, 13 Pick. (Mass.) 53; Engstrom v. Sherburne, 137 Mass. 153; Mooney v. Hinds,

as settled law, especially in view of certain recent rulings of the United States supreme court in the same direction,[316] which, as involving the construction of the constitution, and of an act of congress, must be regarded as of binding authority upon the state courts, and which therefore have the effect to overrule the former decisions and dicta to the contrary. Indeed, the cases referred to, in the supreme court, seem at first sight even to exclude the qualification that the plea of fraud is admissible when it would be admissible at home. This, however, arises from the generality of the terms in which they express the rule, and it is not a necessary inference that the rule is to be applied so strictly as to exclude the case supposed. Thus, in one of the latest cases before that tribunal, Mr. Justice Gray took occasion to remark: "Judgments recovered in one state of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties."[317] The cases following this view have held that if the judgment was founded in fraud, or was entered without the authority of the court, the party injured must resort to that court and there procure the judgment to be vacated. Thus the supreme court of Pennsylvania says: "If the judgment was entered in West Virginia by fraud or collusion, the court in which it was entered is the proper one to redress the wrong. It is a matter with which we have nothing to do."[318] And there seems to be logically no escape from this position, except in cases where the court

160 Mass. 469, 36 N. E. 484; Sanford v. Sanford, 28 Conn. 6; Bicknell v. Field, 8 Paige (N. Y.) 440; Benton v. Burgot, 10 Serg. & R. (Pa.) 240; Johnson v. Dobbins, 5 Wkly. Notes Cas. (Pa.) 537; Supreme Council of Royal Arcanum v. Carley, 52 N. J. Eq. 642, 29 Atl. 813; Hambleton v. Glenn, 72 Md. 331, 20 Atl. 115; Richmond & D. R. Co. v. Gorman, 7 App. D. C. 91; Smedes v. Ilsley, 68 Miss. 590, 10 South. 75; Anderson v. Anderson, 8 Ohio, 108; Ambler v. Whipple, 139 Ill. 311, 28 N. E. 841, 32 Am. St. Rep. 202; Cox v. Barnes, 45 Neb. 172, 63 N. W. 394.

[316] Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475; Maxwell v. Stewart, 22 Wall. 77, 22 L. Ed. 564.

[317] Hanley v. Donoghue, 116 U. S. 1, 4, 6 Sup. Ct. 242, 29 L. Ed. 535.

[318] Wyoming Manuf'g Co. v. Mohler (Pa.) 17 Atl. 31. See, also, Bicknell v. Field, 8 Paige (N. Y.) 440.

which rendered the judgment would itself allow the defense of fraud in an action upon it. Most of the cases on the subject recognize this important exception.[319] But not all of them have been successful in discerning the true rule for ascertaining when the excepted cases occur. For example, in the case of Peel v. January[320] we find the following line of reasoning: In an action on a sister state judgment, only those defenses can be made which could be made against the judgment in the courts of the state where it was rendered. The available defenses must therefore be ascertained by the law prevailing in the state where the judgment was rendered. In the absence of evidence to the contrary, it is presumed that the common law obtains in a sister state. At the common law fraud could not be set up as a defense to an action on a judgment; it could be pleaded only by third persons. Therefore fraud cannot be pleaded by the defendant to an action on such a judgment. The fallacy here is in assuming that the common law is always to be presumed the rule of decision in another state. It is true the question must be governed by the laws of the state from which the judgment comes. But in cases of this sort, as we have already shown,[321] the courts of a sister state are bound to take judicial notice of those laws, or to examine and see for themselves whether the common law really survives in that jurisdiction or has been abrogated. And such an investigation would often lead to a different result from that arrived at in the case cited.

§ 918. Principles Governing the Question.

The topic is not without its difficulties, and the following observations are put forward in the hope that they may to some extent aid the reader in discovering the true principles which should govern it. In the first place, to allow the plea of fraud to be made in all cases, in an action on a judgment of a sister state, would be tantamount to allowing an inquiry into the merits, by an impeachment of the justice of the sentence, which, if the judgment could not be

[319] See Warrington v. Ball, 33 C. C. A. 609, 90 Fed. 464; Bank of Chadron v. Anderson, 6 Wyo. 518, 48 Pac. 197.

[320] 35 Ark. 331, 37 Am. Rep. 27.

[321] Supra, § 860.

assailed on this ground at home, is beyond question inadmissible. This is the ground of the decision in the case of Christmas v. Russell.[322]

It would also, in the case supposed, amount to a collateral attack upon the judgment, which, also, is universally forbidden; and this is the basis of the decision in Anderson v. Anderson.[323]

The allegation of fraud must not be confounded with the right of the defendant to deny that the court had jurisdiction over him. As we have already seen, he may aver that the court never had such jurisdiction, or that the service of process was constructive merely, and that therefore, in the one case, the judgment is void, and in the other case, is extra-territorially invalid. But the present rule forbids him to allege that although the jurisdiction was regularly obtained, and did in fact attach, yet it was fraudulently procured.

In some of the states, where the formal distinction between law and equity is abrogated, the law allows equitable defenses to be set up in an action at law. Hence, in those states, when the suit is upon a domestic judgment, the defendant is allowed to plead any circumstances of fraud which would have justified a court of equity in interfering in his behalf. Now when the same judgment is made the basis of an action in another state, he ought to be allowed the same latitude of defense. For, if it were otherwise, the foreign court would be required to give greater faith and credit to the judgment than it is entitled to at home, which the constitution does not require.

It will be shown in the next section that the courts of one state, in proper cases, may enjoin the prosecution of an action on a judgment from another state. Now in several of the states, where equitable defenses are heard in legal actions, the defendant may directly impeach a domestic judgment by defending against it on grounds which would have moved a court of equity to enjoin its collection. And when the action is on a foreign judgment, or one from a sister state, it is difficult to see why he should not be allowed to pursue the same course. It is not reasonable to put him to the indirect method of bringing a new and independent suit merely because, in the other state, he would have to take the same circuitous course.

[322] 5 Wall. 290, 18 L. Ed. 475.
[323] 8 Ohio, 108.

The question seems to be wholly one of practice. It does not involve the degree of faith and credence to be given to the judgment, but only the remedy of a party fraudulently affected by it.

§ 919. Enjoining Action on Fraudulent Judgment.

The principles upon which the chancery courts of one state will be justified in interfering to restrain proceedings upon a judgment fraudulently recovered in another state were well and clearly laid down by the supreme court of Missouri in the following terms: "In this state, a proceeding in the nature of a bill in equity will lie to enjoin and avoid a domestic judgment obtained through fraud, and like remedies exist and may be resorted to against judgments obtained in other states, when sued on in this state. The fraud, however, for which a judgment will be enjoined must be in the procurement of the judgment. And courts of equity will not vacate or enjoin a judgment merely based upon a cause of action which may be vitiated by fraud, for this is a valid and meritorious defense, which may be interposed, and unless its interposition is prevented by fraud of an adversary, it cannot be asserted against a judgment, either foreign or domestic."[324] Nor does the constitutional provision stand in the way of such a proceeding. For the court of equity does not thereby impugn the foreign judgment, but considers the equities subsisting between the parties and acts upon them personally, restraining the one from pursuing a judgment so obtained and protecting the other.[325]

§ 920. False Evidence and Conspiracy.

A bill in equity for an injunction against the use, in one state, of a judgment rendered in another state, cannot be maintained on the ground that the judgment was obtained by means of the false and fraudulent testimony of the prevailing party or of other witnesses.[326]

[324] Payne v. O'Shea, 84 Mo. 129. See. also. Davis v. Headley, 22 N. J. Eq. 115; Pearce v. Olney, 20 Conn. 544; Black v. Smith, 13 W. Va. 794; Eaton v. Hasty, 6 Neb. 419, 29 Am. Rep. 365; Ward v. Quinlivin, 57 Mo. 425; Gray v. Richmond Bicycle Co., 167 N. Y. 348, 60 N. E. 663, 82 Am. St. Rep. 7[illegible]; Babcock v. Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728.

[325] Pearce v. Olney, 20 Conn. 544.

[326] Metcalf v. Gilmore, 59 N. H. 417, 47 Am. Rep. 217; Riley v. Murray.

Nor will an action lie by the judgment-defendant against the plaintiff and another for fraudulently conspiring together to obtain a judgment against such defendant in an action brought in a court of another state, which court had jurisdiction of the subject-matter and the parties, where the defendant appeared in the action and answered, and where the judgment remains in full force.[327]

§ 921. Fraud Anterior to the Judgment.

If in any case the plea of fraud is admissible in an action on a judgment of a sister state, it must be fraud practised in the very procurement of the judgment, not anterior to it. A defense founded on the fraudulent character of the subject-matter of the suit, which the defendant omits to set up in the court rendering the judgment, cannot be alleged against that judgment when it is made the basis of an

8 Ind. 354. Where in an action on a judgment of a sister state, it appears that the defendant was served in the original action and appeared by attorney, that his testimony was taken by commission, and that the cause was pending for a long time, the mere fact that the defendant expected that the testimony of an important witness would be in his favor, while on the trial he testified against the defendant's case, will not support a plea that the judgment was fraudulently obtained. Weir v. Vail, 65 Cal. 466, 4 Pac. 422.

[327] Engstrom v. Sherburne, 137 Mass. 153. In the case of Brown v. Eaton, 98 Ind. 591, it was held that to a suit by an assignee on a judgment rendered in another state on default, an answer that the defendant had no notice or knowledge of the suit, and was not liable to the judgment-plaintiff on any cause of action, and that he and the present plaintiff and the officer who had made return of service of process had fraudulently conspired together, and made and procured a false return, when in fact there was no service, was good on demurrer. But it is to be noted that the real contention in this case was that the court rendering the judgment had no jurisdiction; because, although it appeared from the record that there had been service, yet that only transpired in consequence of the fraud alleged. In Rose v. Northwest Fire & M. Ins. Co. (C. C.) 67 Fed. 439, it was held that, in an action on a foreign judgment, defendant may show that it was obtained by collusion between plaintiff and one who represented himself to be an agent of the defendant for the purpose of being served with process. And see Gilpin v. Baltimore & O. R. Co. (Com. Pl.) 17 N. Y. Supp. 520. It also appears that, in a suit brought on a judgment rendered in another state upon the appearance and confession of an attorney under a warrant contained in the note sued on, the defendant may show that the judgment was fraudulent and void by reason of the fact that the warrant of attorney had expired by previous payment of the note. First Nat. Bank v. Cunningham (C. C.) 48 Fed. 510.

action in another state.[328] Thus, in New York it is said: "It is a rule well settled that every judgment may be impeached for fraud, and this applies as well to judgments of our own state as to those of other states or foreign judgments. But what will constitute fraud sufficient to vitiate a judgment, and who can make the objection, and under what circumstances it can be interposed, are material questions. The rule is that there must be facts which prove it to be against conscience to execute the judgment, and which the injured party could not make available in a court of law, or which he was prevented from presenting by fraud or accident, unmixed with any fraud or negligence in himself or his agents."[329]

PART VI. SISTER STATE JUDGMENTS IN REM.

§ 922. Probate Adjudications.

The probate of a will in another state is to be regarded as a "judicial proceeding" to the record of which full faith and credit is to be given when authenticated conformably to the act of congress.[330]

[328] Packer v. Thompson, 25 Neb. 688, 41 N. W. 650; Jeter v. Fellowes, 32 Pa. 465; Hockaday v. Skeggs, 18 La. Ann. 681.

[329] Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132.

[330] Haile v. Hill, 13 Mo. 612; Wells v. Neff, 14 Or. 66, 12 Pac. 88; Thomas v. Morrisett, 76 Ga. 384. Compare Gillett v. Camp, 23 Mo. 375. An adjudication of the fact of the domicile of a deceased person, made in the grant of letters of administration, has no probative force upon the question of domicile in a contest in another state, in proceedings for the administration of assets within the latter jurisdiction, where such adjudication was made without any contest inter partes, but in a proceeding in rem on an application under a statute authorizing notice by publication, the publication not being directed against named individuals, and not having for its object the obtaining of specific relief against any one, but being general, and for the purpose of warning all persons who may be concerned of the proposal to determine the question of appointing a legal representative. Overby v. Gordon, 177 U. S. 214, 20 Sup. Ct. 603, 44 L. Ed. 741. In Rhode Island, it is held that the probate of a will in another state is only prima facie evidence of its validity on an application to a probate court of Rhode Island to allow a copy of the same to be filed and recorded; that the constitutional provision does not extend the operation of such a decree to things which, at the death of the testator, were beyond the territorial jurisdiction of the state whose court has taken the probate. Bowen v. Johnson, 5 R. I. 112, 73 Am. Dec. 49; Olney v. Angell, 5 R. I. 108, 73 Am. Dec. 62.

So when the question of the validity of a will has been finally determined by a court of competent jurisdiction in the state of the domicile of the testator, parties to that cause are estopped from raising the same questions in an action on the will in another state.[331] And the courts are bound to respect a decree of another state, enforcing provisions in a will, even though such provisions would be contrary to the policy of their own laws.[332] A judgment obtained by an administrator is a debt at law due him personally, on which he can sue as an individual in a foreign state.[333] So a money judgment rendered by a court of original jurisdiction in a sister state, against one who was at the time the executor of the debtor in that state and also in another state, may be made the basis of an action in the latter state.[334] But it is held that a judgment rendered in one state against an administrator of a decedent will not support an action against a personal representative of the decedent in another state, where it is not alleged that any assets which were formerly in the hands of the administrator in the former state have come into the possession of the representative in the latter state.[335]

Where a state statute requires all claims against a decedent to be presented to the probate court within a limited time after his death, and prohibits any action against an executor or administrator, the action of a probate court of that state disallowing a claim which was not presented until after the lapse of the statutory time, the decedent having been a resident of that state, has the force and effect of a judgment in favor of his estate against the claimant; and such judgment is conclusive against the claimant in the courts of another state.[336] So, also, the record of the final settlement of an administrator, containing debits and credits in full, and an order to the ad-

[331] Dalrymple v. Gamble, 68 Md. 523, 13 Atl. 156.

[332] Caruthers v. Corbin, 38 Ga. 75. But the constitutional provision does not make probate proceedings in one state with respect to a will devising lands in another state conclusive in the latter, since the courts of one state have no jurisdiction over lands in another state. Pritchard v. Henderson, 2 Pennewill (Del.) 553, 47 Atl. 376; Nelson v. Potter, 50 N. J. Law, 324, 15 Atl. 375.

[333] Lewis v. Adams, 70 Cal. 403, 11 Pac. 833, 59 Am. Rep. 423.

[334] Turley v. Dreyfus, 33 La. Ann. 885.

[335] Cherry v. Speight, 28 Tex. 503.

[336] Sanborn v. Perry, 86 Wis. 361, 56 N. W. 337.

ministrator to distribute a balance found in his hands, according to the will and the law, is a "judicial proceeding" within the meaning of the constitution, and conclusive in the courts of another state.[337] On similar principles, where the parties, the issues, and the facts are the same, a court of one state will not revise the decree of a court of another state awarding the custody of a child to one of its parents.[338]

§ 923. Garnishment Proceedings.

When a judgment has been rendered against a garnishee, in one state, upon regular proceedings had in a court invested with jurisdiction of the cause and parties, and without any collusion between the plaintiff and the garnishee, such judgment is binding and conclusive in every other state, and constitutes a complete defense to the garnishee when sued for the same debt by his original creditor.[339] "It has been very well settled in this commonwealth," says the supreme court of Massachusetts, "that a judgment against a garnishee in another state, where the court has jurisdiction of the person and of the subject-matter, will protect one here who has been obliged to pay or is compellable to pay, in pursuance of such judgment, although it be a debt due on a promissory note or other negotiable security, although no such judgment would have been rendered against a garnishee or trustee under our laws, and although such law appears to us a little unreasonable. He who pays under the judgment of a tribunal having legal jurisdiction to decide and adequate power over the person or property to compel obedience to its decisions, has an indisputable claim to protection. But upon general principles, one who has not yet been compelled to pay, and who may never be obliged to pay, to another, who has attached the debt in his hands, although he may have good right to insist that the proceedings ought not to be commenced or prosecuted against him,

[337] Fitzsimmons v. Johnson, 90 Tenn. 416, 17 S. W. 100.

[338] Com. v. Ebert, 24 Pa. Co. Ct. R. 648; Slack v. Perrine, 9 App. D. C. 128.

[339] Morgan v. Neville, 74 Pa. 52; Moore v. Spackman, 12 Serg. & R. (Pa.) 287; Ocean Ins. Co. v. Portsmouth Marine Ry. Co., 3 Metc. (Mass.) 420; Hull v. Blake, 13 Mass. 153; East Tennessee, V. & G. R. Co. v. Kennedy, 83 Ala. 462, 3 South. 852, 3 Am. St. Rep. 755. Compare Renier v. Hurlbut, 81 Wis. 24, 50 N. W. 783, 14 L. R. A. 562, 29 Am. St. Rep. 850; T. & H. Smith & Co. v. Taber, 16 Tex. Civ. App. 154, 40 S. W. 156.

whilst his hands are tied and he is legally prohibited from paying his debt, and so may have good ground for an abatement or stay of proceedings, seems in no condition to deny the plaintiff's right to recover his debt, absolutely and forever." [340] It makes no difference that the claim garnisheed would be exempt from such process in the state where the second action against the garnishee is brought; if the first judgment was in accordance with the laws of the state where it was rendered, it is valid and binding everywhere else.[341] Where a garnishment in another state was pleaded as a defense to an action on an account, it was held competent for the plaintiff to show that the foreign judgment (against the principal defendant) on which the garnishment was based was void for want of jurisdiction, because of matters extrinsic to the record.[342]

§ 924. Decrees in Divorce.

That a judgment rendered by a competent court in another state, in a proceeding for divorce, should be entitled to the same presumptions in its favor, and should be accorded the same degree of faith and credit, as are extended to any other judgment, under the protection of the constitution, would seem to be a self-evident truth. Yet we find a decision of the supreme judicial court of Massachusetts to the effect that, although the court in a sister state rendering a decree of divorce be a court of record, yet "its jurisdiction over the subject of divorce is a special authority not recognized by the common law, and its proceedings in relation to it stand on the same footing as those of courts of limited and inferior jurisdiction, so that its powers in the case must be shown and appear to have been strictly

[340] Meriam v. Rundlett, 13 Pick. 511.

[341] Gray v. Delaware & Hudson Canal Co., 5 Abb. N. C. (N. Y.) 131; Roharge v. Central Vt. R. Co., 18 Abb. N. C. 363. In the case of McCarty v. The City of New Bedford (D. C.) 4 Fed. 818, it was held that the wages earned by a seaman in the coastwise trade of the United States are not subject to garnishment at the instance of a creditor of the seaman in an action at law brought in a state court. And the judgment of the state court in such case, directing the garnishee to pay such wages to the creditor, is void for want of jurisdiction. That is, the proceeding being in rem, and the court having no jurisdiction of the res (the wages), its judgment is not binding on the federal court.

[342] O'Rourke v. Chicago, M. & St. P. R. Co., 55 Iowa, 332, 7 N. W. 582.

pursued."[843] This decision, however, has not commended itself to the judicial reason of other courts. It is supported neither by logic nor authority, and no such doctrine is taught in the cases or text-books, however much they may differ on other points. But the general subject of the interstate validity of decrees of divorce is one which for a long time has bristled with perplexing and contradictory opinions. Much of the difficulty is removed, however, by a right understanding of the nature of the proceeding and a correct use of terms. Without these, it would be hopeless to search for the true principles and rules.

§ 925. Divorce Proceedings are in Rem.

In the first place, a proceeding in divorce is a proceeding in rem. It is not an action by the petitioner against the defendant, at least not primarily. It is a proceeding by the petitioner to obtain an adjudication upon his or her marital status, which is the res; and the person who has the nearest interest in that status, and whose acts are alleged to have given rise to a cause for its dissolution, is named and cited as defendant.[844] In the next place, it is an admitted principle of international law that every state has the sole and paramount right to legislate and adjudicate upon the status of its own domiciled citizens, and to regulate and determine their domestic relations. These two principles will furnish the key to the whole subject. For, accepting them as true, it at once becomes apparent that the jurisdiction in divorce must depend solely upon the domicile of the parties, —upon the power to adjudicate upon their status,—and not upon any question of service of process. "Every state or sovereignty," says the court in Missouri, "has the right to determine the domestic relations of all persons having their domicile within its territory; and therefore, where a husband or wife is domiciled within a particular state, the courts of that state can take jurisdiction over the status, and for proper causes act on this rem and dissolve the relation. The

[843] Commonwealth v. Blood, 97 Mass. 538. And see Kelley v. Kelley, 161 Mass. 111, 36 N. E. 837, 25 L. R. A. 806, 42 Am. St. Rep. 389. Compare Thoms v. King, 95 Tenn. 60, 31 S. W. 983; Davis v. Davis, 2 Misc. Rep. 549, 22 N. Y. Supp. 191.

[844] 2 Bish. Mar. & Div. §§ 147, 156, 164.

decree so pronounced is a judgment in rem, and when not affected by fraud it is valid everywhere, and under the constitution and laws of the United States, such decrees are entitled to full faith and credit in all the states and territories."[845] It thus becomes important to inquire more closely into the question of domicile. And here a variety of possible cases are to be distinguished.

§ 926. Both Parties Citizens of the State.

If both the married parties are bona fide domiciled citizens of a iven state, there can be no question of the power of the courts of ıat state to divorce them. It is immaterial that the marriage was ·lebrated in another state, and that the laws of such other state do ›t recognize the cause alleged as sufficient ground for granting a ·orce. Wherever the parties go they carry their status with them, d it becomes subject to the jurisdiction of any state in which they ıuire an actual domicile. And the causes for altering or dissolving t status must be determined by the laws of the state which has sent jurisdiction over it, not by the laws of the state where it ;inated.[846] Further, in this case, it is immaterial where the offense committed which is alleged as ground for divorce. If both par- were domiciled in one state, and the offense charged was perpe- ·d there, and both afterwards remove to another state and acquire ›micile there, the latter state has jurisdiction to dissolve the iage on the ground of such offense. Here again it is the law of tate having control of the status which must govern, not the lex lelicti.[847] Finally, if both parties are citizens of the state where

Gould v. Crow, 57 Mo. 200.

Harding v. Alden, 9 Me. 148, 23 Am. Dec. 549; Fellows v. Fellows, 8 N. : Barber v. Root, 10 Mass. 265; Vischer v. Vischer, 12 Barb. (N. Y.) awling v. Willson, 13 Johns. (N. Y.) 192; Tolen v. Tolen, 2 Blackf. 07, 21 Am. Dec. 742; Hamill v. Talbott, 72 Mo. App. 22.

olen v. Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742; Fishli v. Fishli, Ky.) 337; Schnaufer v. Schnaufer, 4 La. Ann. 355; Hare v. Hare, 10 ›; Hubbell v. Hubbell, 3 Wis. 662, 62 Am. Dec. 702. The decisions in ımpshire and Pennsylvania to the contrary (Clark v. Clark, 8 N. H. ry v. Frary, 10 N. H. 61, 32 Am. Dec. 395; Batchelder v. Batchelder, . 380; Payson v. Payson, 34 N. H. 518; Dorsey v. Dorsey, 7 Watts ›, 32 Am. Dec. 767; Hollister v. Hollister, 6 Pa. 449) have been strongly

the proceedings are taken, it is immaterial that the defendant is temporarily absent from that state and is only constructively notified of the suit. The New York court of appeals, in an important and well considered case, has declared that jurisdiction of the person of a defendant in an action for divorce may be acquired by a court of the state in which he or she is a domiciled citizen, by such proceedings in the nature of service of process as the law of the state has made equivalent to personal service within its jurisdiction. So long as the citizen retains that relation to the state, he owes it allegiance and is subject to its laws, and this subjection he cannot throw off by a temporary or prolonged absence from the state. A judgment of divorce, therefore, rendered by the courts of any state, against a domiciled citizen thereof, upon a substituted service of process such as the law has authorized in the case of an absent defendant, is valid to effect a dissolution of the marriage contract, and is conclusive upon the defendant in every other state, although he was not within the territorial jurisdiction during the progress of the suit and did not appear therein.[348]

§ 927. Neither Party a Domiciled Citizen.

The converse of the case supposed in the preceding section would be that where neither of the parties was actually domiciled in the state assuming to grant the divorce. And in this event, upon the principles already developed, it is evident that there can be no jurisdiction in the courts of such state. "The tribunals of the country," says Mr. Bishop, "have no jurisdiction over any cause of divorce, wherever or whenever it arose, if neither of the parties has within its territory an actual bona fide domicile. Nor does it make any difference that both parties are temporarily there, submitting to the jurisdiction." [349] And all the American authorities agree in sustaining this doctrine.[350] In a recent case in Maine it was said: "The state

criticised by Mr. Bishop (2 Mar. & Div. §§ 173–177) and shown to be contrary both to sound reason and the weight of authority.

[348] Hunt v. Hunt, 72 N. Y. 217, 28 Am. Rep. 129; Hood v. Hood, 11 Allen (Mass.) 196, 87 Am. Dec. 709; Shaw v. Shaw, 98 Mass. 158; Guest v. Guest, 3 Ont. 344.

[349] 2 Bish. Mar. & Div. § 144.

[350] Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Blain v. Blain, 45

has the absolute right to determine or alter the civil status of all its inhabitants, no matter where they may temporarily be, and no matter where the contracts or acts giving rise to such status may have been made or done. Other states or countries will, in this matter, accept without question the decrees of the court of the home state. But the state has this power only over its own inhabitants. The mere presence within its territory of the inhabitants of other states gives it no authority to fix or change their status. The state of their residence still retains its control over that. It alone can free its citizens from marital obligations. Any proceedings of another state to that end will be ineffectual and will be disregarded elsewhere." [351]

§ 928. Domicile of One Party Sufficient.

It now remains for us to consider the case in which the petitioner is a domiciled citizen of the state where the proceedings in divorce are taken, and the defendant is domiciled elsewhere. And on the admitted principle that each state has the right to determine the status and the domestic relations of its own citizens, the conclusion appears irresistible that the bona fide presence of the res—the status of a domiciled citizen—should give its courts jurisdiction. If this were not so, neither of the two states in which the parties are respectively resident, nor both together, could exercise this unquestioned right. But the question, though easily soluble on purely logical grounds, may also be treated as one settled by authority. And the decided weight of authority is in favor of the rule here contended for.[352] In this connection it must be observed that the usual rule

Vt. 538; Van Fossen v. State, 37 Ohio St. 317, 41 Am. Rep. 507; Gregory v. Gregory, 76 Me. 535; Sewall v. Sewall, 122 Mass. 156, 23 Am. Rep. 299; Davis v. Commonwealth, 13 Bush (Ky.) 318; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; State v. Armington, 25 Minn. 29; Barber v. Root, 10 Mass. 260; Ditson v. Ditson, 4 R. I. 93; Jackson v. Jackson, 1 Johns. (N. Y.) 424; Maguire v. Maguire, 7 Dana (Ky.) 181; Pomeroy v. Wells, 8 Paige (N. Y.) 406. But see, per contra, Ellis v. Ellis, 55 Minn. 401, 56 N. W. 1056, 23 L. R. A. 287, 43 Am. St. Rep. 514.

[351] Gregory v. Gregory, 78 Me. 187, 3 Atl. 280, 57 Am. Rep. 792.

[352] 2 Bish. Mar. & Div. §§ 155, 156; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Ditson v. Ditson, 4 R. I. 87; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 743; Burlen v. Shannon, 115 Mass. 438; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Hubbell v. Hubbell, 3 Wis. 662, 62 Am. Dec. 702;

that the domicile of the wife follows that of the husband, does not apply in these cases. For the purpose of petitioning in divorce, she may have a separate domicile. The law will recognize her as having a separate existence, and separate rights and interests, in all cases where the very object of the proceeding is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests and especially a separate domicile and home.[353]

§ 929. Domicile must be Bona Fide.

While it is sufficient, as just stated, for jurisdictional purposes, that the domicile of the plaintiff should be in the state where the proceedings are had, yet it is necessary that this should be an actual and bona fide domicile and its origin and continuance both free from any fraud. To quote the language of an eminent writer: "We conceive the true rule to be that the actual bona fide residence of either husband or wife within a state will give to that state authority to determine the status of such party, and to pass upon any questions affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage or of any alleged offense, and that any such court in that state as the legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions, and annul the marriage for any cause allowed by the local law. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not bona fide, and does not confer upon that state or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party." [354] And this opinion is amply justified by the rulings of the courts.[355] Thus, in a recent case in Massachusetts, it was said

Dutcher v. Dutcher, 39 Wis. 657; Cook v. Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706.

[353] Harteau v. Harteau, 14 Pick. (Mass.) 181, 25 Am. Dec. 372; Colvin v. Reed, 55 Pa. 379; Jenness v. Jenness, 24 Ind. 355, 87 Am. Dec. 335; Ditson v. Ditson, 4 R. I. 87.

[354] Cooley, Const. Lim. *400.

[355] Lyon v. Lyon, 2 Gray (Mass.) 367; O'Dea v. O'Dea, 101 N. Y. 23, 4 N. E. 110; Neff v. Beauchamp, 74 Iowa, 92, 36 N. W. 905; Gettys v. Gettys, 3 Lea (Tenn.) 260, 31 Am. Rep. 637; Irby v. Wilson, 21 N. C. 568; Magurn v. Magurn,

that if a person goes into another state, in fraud and evasion of the laws of his domicile, without acquiring a domicile in such other state, for the purpose of obtaining, and does fraudulently obtain, a divorce for a cause which occurred in his own state, but which was not a ground of divorce by its laws, a court of the state to which he so removes has no jurisdiction, and its decree granting a divorce is entitled to no faith or credit in other states, although it may recite jurisdictional facts.[356]

§ 930. Conclusiveness of Findings as to Residence.

Although the point is not entirely free from doubt, it appears to be the better opinion that the recitals in the record of a divorce case, that the parties were residents of the state where the suit was instituted, do not preclude a party from showing, in another state, where the divorce comes collaterally in question, that the parties never were in fact domiciled in the former state, and that the suit was fraudulent and collusive.[357] And this accords with the general rule, already stated and discussed, which allows the impeachment of a judgment of a sister state on the ground of want of jurisdiction, even in contradiction of the record.

§ 931. Constructive Service of Process.

If it be conceded that a divorce proceeding is a proceeding in rem, it will necessarily follow that actual and personal notice to the defendant is not indispensable. The vital requisite is the jurisdiction of the res. And power and authority over the res, as we have shown, depends upon the actual and bona fide domicile of the peti-

3 Ont. 570; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Shannon v. Shannon, 4 Allen (Mass.) 134; Cox v. Cox, 19 Ohio St. 502; Leith v. Leith, 39 N. H. 20; Hood v. State, 56 Ind. 263, 26 Am. Rep. 21; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; Holmes v. Holmes, 4 Lans. (N. Y.) 388; In re James' Estate, 99 Cal. 374, 33 Pac. 1122, 37 Am. St. Rep. 60; Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017.

[356] Sewall v. Sewall, 122 Mass. 156, 23 Am. Rep. 299. And see Andrews v. Andrews, 176 Mass. 92, 57 N. E. 333.

[357] People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260. See Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132; Kerr v. Kerr, 41 N. Y. 272; Magowan v. Magowan, 57 N. J. Eq. 322, 42 Atl. 330, 73 Am. St. Rep. 645.

tioner within the state. This being secured, it is immaterial that the other party is only constructively notified of the institution of the proceedings. The citation should be the best that the circumstances permit, and such as will tend to prevent fraud. But it is by no means necessary that it should be the same as is required to justify a judgment in personam. This rule is sustained by a great preponderance of authority, as will appear in the next section.

§ 932. Validity of Divorces Granted on Constructive Notice.

Although the foregoing arguments have generally been accounted complete and irrefragable, yet some of the courts, while conceding one or more of the separate points, have refused to accept the conclusion to which the whole line of reasoning logically and inevitably leads. Thus the books exhibit a few decisions, and some dicta, to the effect that a decree of divorce against a non-resident, founded upon a merely constructive service of process, as by publication, is void and of no effect.[358] But some of these cases have been overruled, others have been tacitly repudiated, and the true and fundamental principles governing the question have become more and more clear to the courts and have gained weight with the increasing body of decisions. So that now the rule may be regarded as settled, by the great preponderance of authority, that a decree of divorce pronounced by a competent court, in favor of a bona fide domiciled citizen of the state and against a non-resident, where service of process was made by a reasonable constructive notice, and in the absence of any fraud or collusion, is valid and binding both in that state and in all other states.[359] As summing up the principles advo-

[358] Borden v. Fitch, 15 Johns. (N. Y.) 121, 8 Am. Dec. 225; Barber v. Root, 10 Mass. 262; Irby v. Wilson, 21 N. C. 568; Dorsey v. Dorsey, 7 Watts (Pa.) 349, 32 Am. Dec. 767; Vischer v. Vischer, 12 Barb. (N. Y.) 640; Atherton v. Atherton, 82 Hun, 179, 31 N. Y. Supp. 977; Lyon v. Lyon, 2 Gray (Mass.) 367.

[359] Cheever v. Wilson, 9 Wall. 108, 19 L. Ed. 604; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549; Hood v. Hood, 110 Mass. 463; Burlen v. Shannon, 115 Mass. 438; Ditson v. Ditson, 4 R. I. 87; Baker v. People, 15 Hun (N. Y.) 256; People v. Baker, 76 N. Y. 78, 32 Am. Rep. 274; State v. Schlachter, 61 N. C. 520; Hull v. Hull, 2 Strobh. Eq. (S. C.) 174; Harrison v. Harrison, 19 Ala. 499; Thompson v. State, 28 Ala. 12; Maguire v. Maguire, 7 Dana (Ky.) 181; Mansfield v. McIn-

d leading to this ultimate conclusion, we quote the following e opinion of Mr. Justice Field in an important decision of ral supreme court. After speaking of the inefficacy of sub-service of process as a foundation for a judgment personally on the defendant, the learned judge observed: "To prevent ıpplication of the views expressed in this opinion, it is proper ·ve that we do not mean to assert, by anything we have ıt a state may not authorize proceedings to determine the : one of its citizens towards a non-resident, which would be within the state, though made without service of process or notice to the non-resident. The jurisdiction which every ssesses to determine the civil status and capacities of all its ıts involves authority to prescribe the conditions on which ngs affecting them may be commenced and carried on within ory. The state, for example, has absolute right to prescribe litions upon which the marriage relation between its own shall be created, and the causes for which it may be dis- One of the parties guilty of acts for which, by the law of ², a dissolution may be granted, may have removed to a ıere no dissolution is permitted. The complaining party ıerefore fail, if a divorce were sought in the state of the ıt, and if application could not be made to the tribunals of plainant's domicile in such case, and proceedings be there l without personal service of process or personal notice to ding party, the injured citizen would be without redress." [860]

933. Matters Incidental to Dissolution of Marriage.

·ee in divorce is in rem, and therefore justified by jurisdiction res alone, only in so far as it affects the marital status. If further than this, and assumes to adjudicate matters col-

hio, 28; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 743; Willcox, 10 Ind. 436; Beard v. Beard, 21 Ind. 321; Wakefield v. Ives, 238; Gould v. Crow, 57 Mo. 200; Wright v. Wright, 24 Mich. 180; . Hubbell, 3 Wis. 662, 62 Am. Dec. 702; Shafer v. Bushnell, 24 Wis. t v. Cook, 56 Wis. 195, 14 N. W. 33, 443, 43 Am. Rep. 706; Cooley, n. *401 and note; 2 Bish. Mar. & Div. §§ 155-164; 2 Kent, Comm.

noyer v. Neff, 95 U. S. 714, 734, 24 L. Ed. 565.

lateral or incidental to the dissolution of the marriage, the proceeding becomes one in personam, and no personal liability can be imposed upon the defendant unless there is jurisdiction of his person acquired by a proper service of process. "All the cases which recognize the jurisdiction of a state to determine the marital status of its own citizens, although one of the parties lives in another state, limit the exercise of it to the dissolution of the marriage. The decree in such cases affects only the status or marriage relation. To go one step further, and say the guilty party, who is a non-resident, and therefore beyond the process of the court, shall not marry again, is quite a different thing. Such a prohibition is not necessarily a part of the decree dissolving the marriage, but in the nature of a decree in personam affecting the rights of parties beyond the jurisdiction of the court."[361] On the same principle, when the defendant in divorce is a non-resident and is not personally served with process within the state, or has not voluntarily submitted himself to the jurisdiction of the court, a decree awarding alimony has no extra-territorial validity, for to that extent it is a purely personal judgment.[362] Where a state statute provided that "whenever a marriage shall be declared void, or dissolved, the party at whose prayer such decree shall be made shall in all cases be entitled to the undivided one-third part in his or her individual right, in fee, of the whole of the real estate owned by the other at the time of such decree. . . . . And it shall be the duty of the court, in all such cases, to enter a decree in accordance with this provision," it was

[361] Garner v. Garner, 56 Md. 127.

[362] Prosser v. Warner, 47 Vt. 667, 19 Am. Rep. 132; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549; Cox v. Cox, 19 Ohio St. 502, 2 Am. Rep. 415. Gould v. Crow, 57 Mo. 200; Lytle v. Lytle, 48 Ind. 200; Beard v. Beard, 21 Ind. 321. But if the court granting a divorce had jurisdiction of the subject-matter and of the person of the defendant, an action may be maintained in another state upon its judgment awarding alimony. Bullock v. Bullock, 57 N. J. Law, 508, 31 Atl. 1024; Dow v. Blake, 148 Ill. 76, 35 N. E. 761, 39 Am St. Rep. 156; Knapp v. Knapp (D. C.) 59 Fed. 641. So, also, where a valid decree is rendered in one state granting an absolute divorce and giving the custody of the child to the mother, habeas corpus will not lie in another state, at the suit of the father, to recover possession of the child on the ground that it is illegally detained from him. Hammond v. Hammond, 90 Ga. 527, 16 S. E. 265.

that a decree of divorce obtained in another state did not come n the purview of this section, so as to affect the title to lands n the first named state.[363]

:T VII. JUDGMENTS OF INFERIOR COURTS OF ANOTHER STATE.

. Doctrine that such Judgments are to be Treated as Foreign Judgments.

: question of the effect and credence to be given to judgments red by the inferior or non-record courts of other states has the subject of considerable dispute. There are several decisions . hold that a judgment of a justice of the peace, for example, other state, is to be considered as standing upon the same id as a strictly foreign judgment, and as leaving the whole ; of the controversy open to investigation.[364] The basis of this ne is that a sister state judgment does not become entitled to 'aith and credit" until it has been authenticated in the manner ·ibed by the act of congress, and that a judgment of a court : record does not admit of being so authenticated. A recent , in speaking of such judgments, observes that "being rendered ırts of only local and very limited and prescribed jurisdiction, ; no clerk nor seal, they are not governed by the act of con- which provides for the authentication of judicial records and :dings. Their effect, therefore, in other states, would seem to same as that accorded to judgments rendered by foreign coun- They must be shown to have been rendered by courts having ction over the parties and subject-matter, to have been author- y the laws of the state where rendered. The judgment itself ›e proved as a fact, like a foreign judgment."[365] But we shall

arrett v. Failing (C. C.) 3 Fed. 471.

'arren v. Flagg, 2 Pick. (Mass.) 148; Robinson v. Prescott, 4 N. H. ahurin v. Bickford, 6 N. H. 567; Taylor v. Barron, 30 N. H. 78, 64 Am. 1, King v. Van Gilder, D. Chip. (Vt.) 59; Graham v. Grigg, 3 Har. 08; Clark v. Parsons, Rice (S. C.) 16; Lawrence v. Gaultney, Cheves 7; McElfatrick v. Taft, 10 Bush (Ky.) 160; Wood v. Wood, 78 Ky. 624. or. Int. St. Law, p. 92. In the case of Taylor v. Barron, 30 N. H. 78, Dec. 281, it was said by Bell, J.: "It was natural that the national ıre should be of the opinion that there might be tribunals in some of

presently endeavor to show that the fundamental assumption on which this reasoning rests is entirely untenable, and that being established, the doctrine must fall with it.

§ 935. Conclusiveness of Justices' Judgments.

Aside from the question of authentication, many well-considered cases hold that a judgment of a justice of the peace of another state, although the court be not one of record, is a "judicial proceeding" within the meaning of the federal constitution, and full faith and credit is to be given to it, that is, it must be considered conclusive on the merits.[366] Thus, the supreme court of Vermont declares that "the conclusive effect of a judgment as evidence rests upon the authority of the court, upon its acting within its jurisdiction, upon its preserving its decisions in proper records, and upon the policy and necessity of determining by law the end of controversy. These

the states of such limited powers that it would be proper to leave their decisions to be dealt with at common law. And the fair construction of the act of congress seems to us to make precisely that exception. It prescribes a mode of proof which implies that there must be a clerk and a judge, chief justice, or presiding magistrate, while it must have been well known that justices of the peace and many other inferior tribunals have no officer that can, with any propriety, be denominated a judge or presiding magistrate. The omission to provide for cases of these classes, it seems, must have been intentional. And when the act provides that the records and judicial proceedings, authenticated as aforesaid, shall have faith, etc., it evidently designs to omit and leave unprovided for the proceedings of such courts as do not admit of such authentication."

[366] Silver Lake Bank v. Harding, 5 Ohio, 545; Stockwell v. Coleman, 10 Ohio St. 33; Pelton v. Platner, 13 Ohio, 209, 42 Am. Dec. 197; Starkweather v. Loomis, 2 Vt. 573; Blodget v. Jordan, 6 Vt. 580; Carpenter v. Pier, 30 Vt. 81, 73 Am. Dec. 288; Kean v. Rice, 12 Serg. & R. (Pa.) 203; Danforth v. Thompson, 34 Iowa, 243; Bissell v. Edwards, 5 Day (Conn.) 363, 5 Am. Dec. 166; Beal v. Smith, 14 Tex. 305; Glass v. Blackwell, 48 Ark. 50, 2 S. W. 257; J. S. Menken Co. v. Brinkley, 94 Tenn. 721, 31 S. W. 92; Anderson v. Chicago Title & Trust Co., 101 Wis. 385, 77 N. W. 710; Howland v. Chicago, R. I. & P. Ry. Co., 134 Mo. 474, 36 S. W. 29. When, by the statute of another state, the transcript of the record of a justice of the peace, filed in a court of common pleas of such state, is directed to be treated as a judgment of said court, such judgment, when transferred to another state as the judgment of said court, is entitled to the same faith and credit as a judgment originally obtained in said court. Rowley v. Carron, 117 Pa. 52, 11 Atl. 435; Bright v. Smitten, 10 Pa. Co. Ct. R. 647.

sons apply to the judgments of justices of the peace as well as any others. The argument that, as justices have no clerks nor ls, and cannot authenticate records in the mode prescribed by act of congress, therefore their judgments are not entitled to full h and credit, seems to rest upon the manner in which the court organized, and its inability to comply with a particular form of henticating its records, rather than upon the broader and more d ground of the authority and jurisdiction of the court, and the erest of the community that there should be an end to litiga- n." [367] But the argument for the conclusiveness of such judg- nts may be based on even broader grounds than these, as was ie in the case of Glass v. Blackwell.[368] This was an action upon istice's judgment from another state, and the court held that it conclusive on the merits. It was contended by the appellee t as the judgment did not come within the act of congress, it st be treated as a foreign judgment was at common law, that is, conclusive on the merits. The court rather inclined to the opin- that the clause in the constitution upon the subject of the inter- e recognition of judgments was self-executing and controlling, was not limited and bounded by the following sentence, giving gress the power to prescribe the manner in which such proceed- s should be proved and the effect thereof. Under that construc- n, sister state judgments would be conclusive by the mere force the constitutional provision and without the aid of legislation. d in that case, justices' judgments would be included, although susceptible of authentication in the manner prescribed by the But the court thought it unnecessary to decide this, inasmuch he judgment ought to be regarded as conclusive at common law. notwithstanding the dicta, in the earlier English cases, against conclusiveness of foreign judgments, the rulings in that country now all the other way, and it is held that a foreign judgment not re-examinable on the merits, if the court had jurisdiction and re was no fraud. And in America also, the current of authority shifted from the earlier standards and is now all in favor of

[367] Carpenter v. Pier, 30 Vt. 81, 73 Am. Dec. 288.
[368] 48 Ark. 50, 2 S. W. 257.

holding a judgment, whether foreign or domestic, rendered by a competent court having jurisdiction and without fraud, binding and conclusive whenever it may be called in question. In either view, therefore, a justice's judgment from another state must be regarded as finally precluding any investigation of the merits.

§ 936. Jurisdictional Inquiries.

A judgment rendered by an inferior court of another state may be impeached by proof that the court had no jurisdiction of the subject-matter.[369] And in accordance with the general rule that no presumptions can be indulged in favor of the validity of the proceedings of inferior courts, it is held that the record of such a judgment must show on its face all the requisites to its validity.[370] Where a state statute provides that "in pleading a judgment or determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made," this provision applies to the judgments of courts of special or limited jurisdiction in other states, as well as to the judgments of domestic courts of that character.[371] But in an action on such a judgment the plea of nul tiel record is not good, as it is no denial of the indebtedness, and cannot put in issue the existence of a record which, if exhibited, must be held to be no record at all.[372]

§ 937. Authentication of Such Judgments.

Some of the cases hold that the judgments of inferior courts in other states do not admit of being authenticated in the manner prescribed by the act of congress, but can only be proved in the same mode as foreign judgments.[373] This doctrine, however, is unsound.

[369] Russell v. Perry, 14 N. H. 152.

[370] Perry v. Northern Ins. Co., 5 Phila. (Pa.) 188; Shufeldt v. Buckley, 45 Ill. 223; Louisville, N. A. & C. Ry. Co. v. Parish, 6 Ind. App. 89, 33 N. E. 122.

[371] Archer v. Romaine, 14 Wis. 375; Terre Haute & I. R. Co. v. Baker, 122 Ind. 433, 24 N. E. 83.

[372] McElfatrick v. Taft, 10 Bush (Ky.) 160.

[373] Mahurin v. Bickford, 6 N. H. 567; Graham v. Grigg, 3 Har. (Del.) 406; McElfatrick v. Taft, 10 Bush (Ky.) 160.

e is in reality no reason why the act should not apply to the ·ds of such courts. In the first place, it is objected that the orials of proceedings before such courts are not records in the ıical sense. But the statute applies equally to "records and ial proceedings," the latter term, from the very fact of its being d to the former, being obviously intended to cover just that of proceedings which could not properly be denominated rec- from the fact of their being had in inferior or non-record courts. ıe next place, it is said that such tribunals have neither clerk seal. As to the latter, the statute requires the annexing of the of the court, if there be a seal. If there is none, that fact may ertified, and the omission, thus explained, does no harm. But all courts of record have seals, the fact that congress added a proviso shows that it was intended the act should apply to record courts as well. As to the clerk, it is very reasonably that the justice may authenticate the record of his proceedings ıe capacity of both judge and clerk of his court.[374] There is : plausibility in the contention that a justice of the peace cannot escribed as a "judge or chief justice," but it will scarcely be ·d that the following term, "presiding magistrate," very aptly ·ibes him. On the whole, therefore, the conclusion seems in- ble, not only that the act of congress can be made to cover the ments of inferior courts and magistrates, but that it was spe- .lly so intended.

VIII. Conclusiveness of Judgments as between Federal, State, and Territorial Courts.

§ 938. Federal Judgments in the State Courts.

ıe federal tribunals are not regarded as foreign to each other) the state courts. Hence a judgment or decree duly rendered federal court of competent jurisdiction is binding and conclu- upon the parties in all subsequent litigation between them in the :s of the state where the federal tribunal held its session, and lly in the courts of any other state, and is not subject to review

Casé v. Huey, 26 Kan. 553.

or impeachment in any of such courts.[375] The rule on this subject enunciated by the supreme court of the United States is as follows: The judgments and decrees of the federal courts, sitting in a particular state, are to be accorded in the courts of that state, whether as the foundation of an action or of a defense, either by plea or in proof, such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority; and whether such due effect has been given by a state court to a judgment or decree of a federal court is a federal question, within the jurisdiction of the supreme court of the United States on a writ of error to the court of highest authority of the state.[376] "The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the constitution in the government of the United States . . . any department or officer thereof, and which declare the supremacy of the authority of the national government within the limits of the constitution. As part of its general authority, the power to give effect to the judgments of its courts is co-extensive with its territorial

[375] Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co. (C. C.) 46 Fed. 584; Durant v. Essex Co., 90 Mass. 103, 85 Am. Dec. 85; Dennison v. Hyde, 6 Conn. 508; Rounds v. Providence & S. S. S. Co., 14 R. I. 344; Woodhouse v. Duncan, 106 N. Y. 527, 13 N. E. 334; In re Williamson, 26 Pa. 9, 67 Am. Dec. 374; Wandling v. Straw, 25 W. Va. 692; Niblett v. Scott, 4 La. Ann. 246; Pasteur v. Lewis, 39 La. Ann. 5, 1 South. 307; McCauley v. Hargroves, 48 Ga. 50, 15 Am. Rep. 660; Dudley v. Lindsey, 9 B. Mon. (Ky.) 486, 1 Am. Rep. 522; New York & T. Land Co. v. Votaw (Tex. Civ. App.) 52 S. W. 125; Ruegger v. Indianapolis & St. L. R. Co., 103 Ill. 449; Knowlton v. Hanbury, 117 Ill. 471, 5 N. E. 581; Harrison v. Phœnix Mut. Life Ins. Co., 83 Ind. 575; Moore v. Jeffers, 53 Iowa, 202, 4 N. W. 1084; City of Detroit v. Ellis, 103 Mich. 612, 61 N. W. 886; Copenhaver v. Stewart, 118 Mo. 377, 24 S. W. 161, 40 Am. St. Rep. 382; Semple v. Hagar, 27 Cal. 163.

[376] Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union Slaughter-House & Live-Stock Landing Co., 120 U. S. 141, 7 Sup. Ct. 472, 30 L. Ed. 614; Pittsburgh, C., C. & St. L. Ry. Co. v. Long Island Loan & Trust Co., 172 U. S. 493, 19 Sup. Ct. 238, 43 L. Ed. 528; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506, 44 L. Ed. 619.

liction."[377] The federal courts, therefore, are not to be re-
:d in the light of foreign tribunals by the state courts; and con-
:ntly, in an action brought in a state court upon the judgment
federal court held in the same or any other state, a party can-
;et up and relitigate defenses which were pleaded and decided
:st him in the first action.[378] And since a federal court is nei-
a foreign court nor a court of inferior jurisdiction, nil debet is
ı good plea to an action on a judgment rendered by such
ırt.[379]

illustrate these rules,—a judgment in mandamus by a United
s circuit court, directing a state county court to issue warrants
ɔunty bonds in aid of a railroad payable out of the general rev-
of the county, must be taken as an adjudication of the status
d bonds by a court of competent jurisdiction, and is not review-
n a state court.[380] In another case plaintiff brought an action
;tate court, and a judgment was rendered against him. At his
st, the judgment was vacated, and the cause set down for an-
trial. Before the second trial, he dismissed the action, and
quently brought a like suit against the same parties in the fed-
ourt, which court held that the former proceedings barred the
iff from maintaining the proceeding in that tribunal. After-
, the plaintiff brought a similar action against the same parties
state court. But it was held that the decision of the federal
was conclusive and precluded the plaintiff from maintaining
ıction.[381] It makes no difference that a judgment rendered by
:ral court is such as could not have been recovered by the
iff in a state court. Thus, the fact that a judgment for personal

:mbry v. Palmer, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346.
:homson v. Lee County, 22 Iowa, 206; Niblett v. Scott, 4 La. Ann. 246;
; v. Patterson's Lessee, 6 Har. & J. (Md.) 182. But judgments of
deral courts are not domestic judgments, in the sense that it cannot
wn on collateral attack that the court failed to acquire jurisdiction
he person of the defendant; and the fact that he was a resident of
ıte does not change the rule. League v. Scott (Tex. Civ. App.) 61 S.
1.
Town of St. Albans v. Bush, 4 Vt. 58, 23 Am. Dec. 246.
State v. Trammel, 106 Mo. 510, 17 S. W. 502; Garland County v. Hot
County, 68 Ark. 83, 56 S. W. 636.
Hyatt v. Challis, 59 Kan. 422, 53 Pac. 467.

injuries was recovered against a lessee in a federal court having jurisdiction, and could not have been recovered had the person injured sued in the state court, cannot defeat the lessee's right to sue the sublessee, whose negligence caused the injury, in a state court, since the latter court must give the same force and effect to judgments of the federal courts as to those of the state courts.[382]

§ 938a. Authentication of Federal Judgments.

Since the act of congress for carrying into effect the "full faith and credit" clause of the constitution (Rev. St. U. S. § 905) does not specifically apply to judgments of the federal courts, in respect to the mode of authentication, the question early arose as to the manner in which they should be proved in the courts of the states. It was held in Mississippi that such judgments must either be construed to be impliedly embraced in the act of congress, or else they must be esteemed as foreign judgments, but in either case the judgment must be properly authenticated; and in a suit in a state court the certificate of a discharge in bankruptcy by a clerk of a United States district court, under the seal of the court, was not admissible in evidence without the authentication of the clerk's certificate by the judge.[383] But, as stated in a later case, it has been the uniform practice, ever since 1790, to follow the requirements of Rev. St. § 905, as to the certificate of the clerk and judge in authenticating the records and judicial proceedings of the United States courts, though that section does not include them in terms; and an authentication which conforms thereto is sufficient.[384]

§ 938b. Judgment of Federal Court as Foundation for Creditor's Bill.

In the state of New York, it is held that a creditor's bill will not lie in the courts of that state upon a judgment recovered in a federal court; the jurisdiction is regarded as so far foreign that the state courts will not recognize the proceedings of the national courts as a

[382] Oceanic Steam Nav. Co., Limited, v. Compania Transatlantica Espanola. 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685.

[383] Dorsey v. Maury, 10 Smedes & M. 298.

[384] O'Hara v. Mobile & O. R. Co., 22 C. C. A. 512, 76 Fed. 718.

ion which to afford relief.[385] In Illinois, the earlier decisions to the same view,[386] but later rulings of the courts of that pear to favor the doctrine that a creditor's bill may be based judgment of a federal court as well as upon one rendered by a f the state itself.[387] And the latter rule is now recognized epted by the courts of all the other states.[388]

gard to the converse question,—the right to maintain a cred- ill in a federal court on a judgment of a state court,—the de- of the United States courts reflect the rulings in the courts states where they are held. Thus, in New York, the federal refuse to take cognizance of a creditor's bill founded on a nt of another state. They hold that it must be sued over it can become a judgment for the purpose of any remedy heir jurisdiction, either at law or in equity.[389] But the courts United States elsewhere all agree in the view that a creditor's lie in a federal court on a judgment recovered in a state court, essary conditions as to jurisdiction and the plaintiff's right to eing shown to exist.[390] It makes no difference whether the

rbell v. Griggs, 3 Paige, 207, 23 Am. Dec. 790; Davis v. Bruns, 23 8.

ere v. Hoagland, 39 Ill. 264; Winslow v. Leland, 128 Ill. 304, 21 88.

e Dilworth v. Curts, 139 Ill. 508, 29 N. E. 861. In this case, an is made to distinguish the rulings in the earlier cases cited in the g note. It is said that it was held in those cases that proof of a it rendered in a federal court (that being a court of another juris- was not sufficient evidence of a judgment at law or in equity to sus- reditor's bill brought in a state court. But this, the court thought, ogether a different matter from holding that the state court would e jurisdiction of such a bill founded on such a judgment. It might decree on insufficient evidence, but that would be a mere error in affecting the jurisdiction of the court.

own v. Bates, 10 Ala. 432; Bullitt v. Taylor, 34 Miss. 708, 69 Am. Dec. ish v. Arnold, 50 Mo. App. 8; First Nat. Bank v. Sloman, 42 Neb. N. W. 589, 47 Am. St. Rep. 707; Chicago & A. Bridge Co. v. Fowler, 17, 39 Pac. 727.

aflin v. McDermott (C. C.) 12 Fed. 375; Walser v. Seligman (C. C.) 415, 21 Blatchf. 130.

ilkinson v. Yale, 6 McLean, 16, Fed. Cas. No. 17,678; Alkire Grocery ichesin (C. C.) 91 Fed. 79; Bidwell v. Huff (C. C.) 103 Fed. 362.

judgment was recovered in a court of that state wherein the federal court sits or of some other state.[391]

In New York, the return of an execution unsatisfied upon a judgment rendered by a federal court within the state does not authorize the institution of supplementary proceedings thereon; and this, although a statute of the state provides that a transcript of a judgment of a federal court sitting within the state may be filed with the county clerk, who must docket it as if it had been rendered by the supreme court of the state; for this statute does not render the judgment a domestic judgment in such sense that executory process may be issued upon it.[392] But in some other states it appears that a different rule obtains.[393]

§ 938c. State Judgments in Federal Courts.

A judgment rendered by a state court of competent jurisdiction is binding and conclusive upon the parties when made the basis of a claim or defense in any court of the United States. In the latter court, the controversy will not be open to re-examination on the merits, and the judgment of the state court cannot be impeached for any error or irregularity, but must receive the same faith and credit which would be accorded to it in the courts of the state where it was rendered.[394] The act of congress applicable to the subject provides

[391] Merchants' Nat. Bank v. Chattanooga Const. Co. (C. C.) 53 Fed. 314.

[392] Tompkins v. Purcell, 12 Hun, 662.

[393] See Ballin v. Loeb, 78 Wis. 404, 47 N. W. 516, 10 L. R. A. 742.

[394] Caldwell v. Carrington, 9 Pet. 86, 9 L. Ed. 60; Chicago & A. R. Co. v. Wiggins Ferry Co., 108 U. S. 18, 1 Sup. Ct. 614, 27 L. Ed. 636; Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054; Kaukauna Water-Power Co. v. Green Bay & M. Canal Co., 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004; Fallbrook Irrigation Dist. v. Bradley, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369; Blythe v. Hinckley, 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783; Forsyth v. City of Hammond, 166 U. S. 506, 17 Sup. Ct. 665, 41 L. Ed. 1095; Harper v. Harper, 3 U. S. App. 328, 3 C. C. A. 415, 53 Fed. 35; Elder v. Richmond G. & S. Min. Co., 7 C. C. A. 354, 58 Fed. 536; Clay v. Deskins, 8 U. S. App. 661, 11 C. C. A. 229, 63 Fed. 330; Compton v. Jesup, 31 U. S. App. 486, 15 C. C. A. 397, 68 Fed. 263; Loyd v. Waller, 20 C. C. A. 548, 74 Fed. 601; Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 468, 76 Fed. 429; State Trust Co. v. De LaVergne Refrigerating Mach. Co., 44 C. C. A. 556, 105 Fed. 468; Amory v. Amory, 3 Biss. 266, Fed. Cas. No. 334; Field v. Gibbs, 1 Pet. C. C. 155, Fed. Cas. No. 4,766; Montford v. Hunt,

the records and judicial proceedings of any state or territory . shall be proved or admitted in any other court within nited States, by the attestation of the clerk, ... and d records and judicial proceedings, so authenticated, shall have ıith and credit given to them in every court within the United as they have by law or usage in the courts of the state from they are taken." [395] This act of congress, it has been said, perhaps further than the constitutional requirement, which re- ɔ the faith and credit to be given in each state to the public ecords, and judicial proceedings of every other state, inasmuch eclares the effect of the records and judicial proceedings of the when authenticated as provided, 'in every court within the Unit- tes,' thus making its provisions applicable to the national as well as to the courts of the states." But "the power of ss to prescribe the manner in which the records of the states e proved in the national courts, and the effect which shall be o them, is independent of the constitutional provision." [396] At ne time, while the courts of the United States are not foreign ls in their relation to the state courts, they are tribunals of a ıt sovereignty, and they are bound to give to a judgment of a ourt only the same faith and credit to which it is entitled in ırts of another state.[397] In a proceeding to enforce a liability by a state statute, the federal courts will give to a judgment ate court the same effect, either as evidence or as a cause of which is given to it in like proceedings in the courts of the

. C. C. 28, Fed. Cas. No. 9,725; Earl v. Raymond, 4 McLean, 233, Fed. . 4,243; In re Dunn, 2 Hughes, 169, Fed. Cas. No. 4,172; Owens v. 4 Dill. 436, Fed. Cas. No. 10,634; Howards v. Selden (C. C.) 5 Fed. 465; . Price (C. C.) 32 Fed. 447; Russell & Co. v. Lamb (C. C.) 49 Fed. Chambrun v. Campbell (C. C.) 54 Fed. 231; Pennsylvania R. Co. v. l Docks & N. J. J. C. R. Co. (C. C.) 58 Fed. 929; Lake Erie & W. R. Smith (C. C.) 61 Fed. 885; Consolidated Wyoming Gold Min. Co. v. on Min. Co. (C. C.) 62 Fed. 945; Louisville Trust Co. v. City of ıtl (C. C.) 73 Fed. 716; Philbrook v. Newman (C. C.) 85 Fed. 139; nery v. McDermott (C. C.) 87 Fed. 374; Alkire Grocery Co. v. ı (C. C.) 91 Fed. 79.

v. St. U. S. § 905.

ılpin v. Page, 3 Sawy. 93, Fed. Cas. No. 5,206.

nn yer v. Neff, 95 U. S. 714, 24 L. Ed. 565.

state whose laws are invoked in the enforcement.[398] But a decree of a state court is not a bar to a suit in a federal court on a question which, although it might possibly have been litigated in the state court if properly pleaded, was in fact neither pleaded nor litigated.[399]

It should be observed that the rule of res judicata as between federal and state courts is entirely separate and distinct from the rule which requires the courts of the United States to adopt and follow the decisions of the state courts on questions involving the construction of state statutes and the like, but exempts them from following such decisions on questions of general commercial law, general equity jurisprudence, and some other subjects. A final decision in a state court bars a subsequent suit in a federal court on the same cause of action as effectually when the issues involve questions of general commercial law, or general equity jurisprudence, as when they involve the interpretation of a state constitution or law, or some local law, usage, or custom. "State-court judgments are as much entitled to respect from federal courts as federal courts from those of the state. A precedent is one thing; a judgment, another. The decision of one case may become a precedent in another case. This depends upon the analogies of the cases, but the cases are and must be different. The question of res judicata is not like a precedent in fact or principle. A precedent may apply to it and control it, but the plea of res judicata belongs to but one cause of action. There may be, and must be, two or more suits in the same forum, or in different forums, but it must, in each suit, be essentially the same cause of action."[400]

§ 939. Jurisdiction May be Questioned.

When a judgment rendered by a state court is sued on in a federal court, or set up in bar of an action, the party supposed to be bound by it may aver and prove, even in contradiction of the record, any fact showing that the court had no jurisdiction over him; as, that he was not a resident within the territorial jurisdiction of the court

[398] Chase v. Curtis, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1068.
[399] De Chambrun v. Schermerhorn (C. C.) 59 Fed. 504.
[400] Fuller v. Hamilton County (C. C.) 53 Fed. 411.

ring the judgment, that he was not personally served with pro-
within that jurisdiction, or that the attorney who appeared for
had no authority to do so. If he succeeds in establishing a
of jurisdiction, the judgment loses all its force as evidence
a bar.[401] The courts of the United States do not regard as
or as importing verity, a judgment in personam rendered by
e court for the recovery of a debt or demand, unless the de-
nt either entered a voluntary appearance, or he or some one
rized to receive service of process for him was personally cited,
the jurisdiction of the court, to appear in the action.[402]
a decree of a state court, in an action not in rem, rendered
st a citizen of another state, who was cited by publication only,
ected by the local statute, is no bar to an action by him in a
l court concerning the same subject-matter.[403]
te courts also have the right to examine collaterally into the
d defects of judgments rendered by United States courts of
al and limited jurisdiction, when such judgments are made
asis of actions or of litigants' titles. But the inquiry must
stricted to an examination to ascertain whether the court
rendered the judgme- had jurisdiction, and whether it ex-
l that jurisdiction according to the forms of proceeding estab-
by law. The inquiry into the facts must be restricted to test
erity of allegations as to domicile or citizenship necessary to
urisdiction. Want of jurisdiction may be shown either as to
bject-matter or the person, or, in proceedings in rem, as to the
[404] In Minnesota, it has been held that a judgment of the
d States circuit court for the district of Minnesota stands on

ytle v. Town of Lansing, 147 U. S. 59, 13 Sup. Ct. 254, 37 L. Ed.
kking v. Pfaff, 33 C. C. A. 328, 91 Fed. 60, 43 L. R. A. 618; Wood v.
f Mobile, 47 C. C. A. 9, 107 Fed. 846; Galpin v. Page, 3 Sawy. 93,
as. No. 5,206; Graham v. Spencer (C. C.) 14 Fed. 603; Swift v. Meyers
13 Sawy. 583, 37 Fed. 37; L'Engle v. Gates (C. C.) 74 Fed. 513.
t. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222; Pennoyer
f, 95 U. S. 714, 24 L. Ed. 565.
Iart v. Sansom, 110 U. S. 151, 3 Sup. Ct. 586, 28 L. Ed. 101; Cooper
vell, 173 U. S. 555, 19 Sup. Ct. 506, 43 L. Ed. 808.
Slocum v. Wheeler, 1 Conn. 429; Pasteur v. Lewis, 39 La. Ann. 5,
h. 307; McCauley v. Hargroves, 48 Ga. 50, 15 Am. Rep. 660; Gibson
nufacturers' F. & M. Ins. Co., 144 Mass. 81, 10 N. E. 729; Southern

the same footing as a domestic judgment of a court of record in the state and cannot be impeached in a collateral proceeding unless a want of jurisdiction appears affirmatively on the record.[405] But the cases do not furnish any sufficient reason for discriminating between federal courts within the state and federal courts without the state, in respect to the validity and conclusiveness of their judgments. It has also been held that a judgment rendered in one federal court cannot be attacked collaterally in another because the jurisdictional averment as to the citizenship of the plaintiff was insufficient.[406] Finally, when the question of jurisdiction is one depending upon some local law or statute, and is raised in the court which rendered the judgment, and there decided, its determination, upholding its own jurisdiction, is just as binding and conclusive as the decision on the merits. Thus, a decision by a state court sustaining personal service of process made while the defendant was attending court as a party is binding on the federal courts, and the judgment founded upon it cannot be collaterally attacked therein on the ground that such service was void.[407]

§ 939a. Lis Pendens and Priority of Decision.

As between courts of the same system, exercising a concurrent jurisdiction, the pendency of a prior suit between the same parties upon the same subject-matter will be pleadable in bar or in abatement; but this rule does not extend to courts of a foreign jurisdiction.[408] State courts and the federal courts are not strictly speaking foreign to each other, but they are tribunals of different sovereignties; and therefore we have the well-settled rule that the mere pendency of a prior suit in a state court, though it be between the same parties and upon the identical cause of action, will not prevent a federal court from taking jurisdiction, nor be effective as a plea

Ins. Co. v. Wolverton Hardware Co. (Tex.) 19 S. W. 615; Hovey v. Elliott. 61 N. Y. Super. Ct. 409, 21 N. Y. Supp. 108.

[405] Sandwich Manuf'g Co. v. Earl, 56 Minn. 390, 57 N. W. 938.

[406] Rice v. Adler-Goldman Commission Co., 18 C. C. A. 15, 71 Fed. 151

[407] Sipe v. Copwell, 8 C. C. A. 419, 59 Fed. 970.

[408] Latham v. Chafee (C. C.) 7 Fed. 520; Hospes v. O'Brien (C. C.) 24 Fed. 145; supra, §§ 690, 865.

ar or in abatement; and vice versa.[409] But while the defendant suit brought in a federal court cannot demand, as a matter of se, that the action shall abate upon his showing the pendency similar suit in a state court, yet it is always within the comnce of the federal court to refuse to entertain a suit between same parties, when the issues and the interests involved in the suits are the same.[410] And it has been declared that, in cases oncurrent jurisdiction, it is a fixed rule of the federal courts r to take jurisdiction of a cause which presents the same issues seeks the same relief as are presented and sought in a cause ling in a state court.[411]

nd where suits upon the same cause of action are pending simneously in a state court and in a federal court, a final judgment red in either court will be binding and conclusive in the other, out any regard to the question which suit was first comced.[412]

' Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983; Gordon v. Gilfoil, 99 . 168, 25 L. Ed. 383; Liggett v. Glenn, 2 C. C. A. 286, 51 Fed. 381; of North Muskegon v. Clark, 10 C. C. A. 591, 62 Fed. 694; Gilmour v. ıg (C. C.) 50 Fed. 656; Sharon v. Hill (C. C.) 22 Fed. 28; Walsh v. :in, 12 Johns. (N. Y.) 99; Litchfield v. City of Brooklyn, 13 Misc. Rep. 34 N. Y. Supp. 1090; State v. Boyce, 72 Md. 140, 19 Atl. 366, 7 L. R. A. 20 Am. St. Rep. 458; Pomeroy v. Chandler (N. J.) 30 Atl. 1092; Hatch ›offord, 22 Conn. 485, 58 Am. Dec. 433; Davis v. Morton, 4 Bush (Ky.) 96 Am. Dec. 309; Allen v. Watt, 69 Ill. 655; McJilton v. Love, 13 Ill. 54 Am. Dec. 449; Smith v. Lathrop, 44 Pa. 326, 84 Am. Dec. 448; Lock- : v. Nye, 2 Swan (Tenn.) 515, 58 Am. Dec. 73.

' Martin v. Baldwin (C. C.) 19 Fed. 340.

State Trust Co. v. National Land Imp. & Manuf'g Co. (C. C.) 72 Fed. following Gates v. Bucki, 4 C. C. A. 116, 53 Fed. 961.

: Nugent v. Philadelphia Traction Co. (C. C.) 87 Fed. 251; United States ›wey, 6 Biss. 501, Fed. Cas. No. 14,956; Duden v. Maloy (C. C.) 43 Fed. Where a suit is removed to a federal court after the state supreme court ›assed upon a demurrer filed in the suit, the decision on such demurrer ıding on the federal court. Lookout Mountain R. Co. v. Houston (C. C.) ed. 449. But the fact that a judgment in the state court is res judicata e questions litigated in an action removed to the federal court does not ve the latter court of jurisdiction where a federal question is involved. olidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C.) 62 Fed.

§ 939b. Judgments of Territorial Courts.

An act of congress of 1804 provides for the manner of attesting or authenticating the records and judicial proceedings of the courts of "any state or territory, or of any country subject to the jurisdiction of the United States;" and provides for their admission as evidence, when so authenticated, "in any other court within the United States," and declares that they shall have "such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."[413] Under these provisions, the judgments and judicial records of the courts of the several territories stand on the same footing as those of the courts of a state, and are equally conclusive, and equally entitled to faith and credit, when made the basis of a claim or defense in any court within the United States, whether state or national.[414] But in an action in a state court, on a judgment recovered in one of the territories, the defendant may show, notwithstanding recitals in the record to the contrary, that the court had no jurisdiction of the subject-matter, or of the defendant.[415]

Although the District of Columbia is not technically a "state" nor yet a "territory," it is within the provisions of the act of congress referred to. The supreme court of the District is a court of the United States, and its judgments and decrees, when suit is brought thereon in any state of the Union, or when they are set up as a defense or a bar, are conclusive upon the defendant, under the legislation of congress, except that they may be impeached for want of jurisdiction or for such other cause as would be sufficient to set them aside in the courts of the District.[416]

[413] Rev. St. U. S. § 905.

[414] Hughes v. Davis, 8 Md. 271; Suesenbach v. Wagner, 41 Minn. 108, 42 N. W. 925; Coughran v. Gilman, 81 Iowa, 442, 46 N. W. 1005; Ehrngren v. Gronlund, 19 Utah, 411, 57 Pac. 268.

[415] Gibson v. Manufacturers' F. & M. Ins. Co., 144 Mass. 81, 10 N. E. 729.

[416] Embry v. Palmer, 107 U. S. 3, 2 Sup. Ct. 25, 27 L. Ed. 346; Johnson v. Dobbins, 12 Phila. (Pa.) 518, 5 Wkly. Notes Cas. 537; Hovey v. Elliott, 61 N. Y. Super. Ct. 409, 21 N. Y. Supp. 108.

§ 93:c. Judgments of Indian Courts.

e treaties made by the United States with the Creeks, Chero- Choctaws, and other tribes of civilized Indians, have guaran- to them, among other things, the right to establish and main- courts of justice. These Indian courts have exclusive juris- ɔn, both civil and criminal, where only members of the tribe, by ity or adoption, are concerned; but jurisdiction of cases in h citizens of the United States are parties is reserved to the ɔpriate federal courts.[417] The authorities have fully established :ule that the judgments of the courts of the Indian nations in ndian Territory, when proceeding within their jurisdiction, stand ıe same footing with those of the federal territorial courts and :ntitled to the same faith and credit.[418] In respect to the ques- of personal jurisdiction, "it is competent for a white man to e the treaty and statutory stipulations exempting him from the diction of the Cherokee courts; and when he enters a general arance to an action pending in those courts, and pleads to the ts, and there is a trial upon such plea, he thereby waives the ıption, and submits himself to the jurisdiction of the court, and not afterwards be heard to contest the validity of the proceed- and judgment of the Cherokee court upon the ground that it no jurisdiction of his person."[419] But just as a judgment ren- d by a court of a state may be impeached for want of jurisdic- when relied on in a court of another state, or in a federal court, is competent, in an action in a state or national court, to attack terally, on the ground of lack of jurisdiction, a judgment ren- d by a court of one of the Indian nations.[420] But in deter-

See 7 Stat. 478; 14 Stat. 799; 25 Stat. 783, § 6; 26 Stat. 81; Ex parte ield, 141 U. S. 107, 11 Sup. Ct. 939, 35 L. Ed. 635.

Standley v. Roberts, 19 U. S. App. 407, 8 C. C. A. 305, 59 Fed. 836; in v. Ice, 12 U. S. App. 305, 5 C. C. A. 403, 56 Fed. 12; Cornells v. Shan- 11 C. C. A. 465, 63 Fed. 305; Exendine v. Pore, 6 C. C. A. 112, 56 Fed. Mackey v. Coxe, 18 How. 100, 15 L. Ed. 299.

Mehlin v. Ice, 12 U. S. App. 305, 5 C. C. A. 403, 56 Fed. 12; Exendine v. 6 C. C. A. 112, 56 Fed. 777; Cornells v. Shannon, 11 C. C. A. 465.

Raymond v. Raymond, 1 Ind. Ter. 334, 37 S. W. 202.

mining the validity of a judgment rendered by one of these Indian courts, on a plea of res judicata, the court will disregard informalities, and enforce the intent of the judgment, gathered broadly from the entire proceeding.[421]

[421] Barbee v. Shannon, 1 Ind. Ter. 199, 40 S. W. 584.

CHAPTER XXIII.

ASSIGNMENT OF JUDGMENTS.

Effect of Assignment at Common Law.
Parties to Assignment of Judgments.
What Judgments Assignable.
Agreement to Assign Future Judgment.
Assignment of Part of Judgment.
Mode of Assignment.
Statutory Mode of Assignment.
Equitable Assignment.
Title Passing to Assignee.
Rights as against Assignor.
Notice of Assignment.
Right of Assignee to Sue.
Rights as against Judgment-Debtor.
Assignee Takes Subject to Equities.
Set-Off of Judgment against Judgment.
Vacation or Reversal of Judgment in Assignee's Hands.
Latent Equities of Third Persons.
Priority between Assignments.

§ 940. Effect of Assignment at Common Law.

the common law, a verdict or judgment was not considered as · in itself negotiable.[1] Hence, under that system, a judgment :cree was not assignable so as to vest the legal title in the as- e. The latter could take only an equitable interest, which was ct to every equity and charge which attached to the judgment e hands of the assignor.[2] As a consequence of this doctrine llows that, wherever the rule is not changed by statute, the nee of a judgment is powerless to maintain an action thereon, · sue out scire facias for its revival, in his own name and behalf. :very such proceeding the assignor, as holding the legal title, be a party.[3] But the presence of the assignor on the record

loomstock v. Duncan, 2 McCord (S. C.) 318, 13 Am. Dec. 728; Edmonds ntgomery. 1 Iowa, 143.

. S. v. Samperyac, Hempst. 118, Fed. Cas. No. 16,216a.

.oore v. Ireland, 1 Ind. 531; Reid v. Ross, 15 Ind. 265; Forbes v. Tif- 4 Ind. 204; Edmonds v. Montgomery, 1 Iowa, 143; Elliott v. Waring, 5

is merely formal. The assignee is the real party in interest. His equitable title is sufficient to entitle him to sue in the name of the assignor whenever he may choose, and to control the issue of final process and receive the money collected.[4] But these common law rules have been abrogated in most if not all of the states, either by statutes explicitly relating to the assignment of judgments, or by the general authorization of actions in the name of the "real party in interest," thus investing the assignee with the complete legal title. This will more fully appear in a succeeding section.

§ 941. Parties to Assignment of Judgments.

In order to be able to make an assignment of a judgment, the person must have a real and substantial interest in it. Hence the assignee of a judgment takes nothing when the record of the judgment itself apprises him that the plaintiff therein had no beneficial interest, but was a mere trustee for others.[5] The general retainer of an attorney at law does not give him any power to assign the judgment or decree obtained by his client.[6] And a judgment in favor of the state, when paid by a surety, cannot be assigned to such surety by any officer or agent of the state.[7] There is no reason why an ordinary corporation should not be able, acting through a person duly empowered, to assign a judgment subsisting in its own favor.[8] And it has been held that this may be done by a national bank.[9]

So also, an ordinary business corporation may take an assignment of a judgment and sue thereon.[10] The purchase of a judgment by

T. B. Mon. (Ky.) 339, 17 Am. Dec. 69; Mayor, etc., of City of Macon v. Trustees of Bibb County Academy, 7 Ga. 204; McKinney v. Mehaffey, 7 Watts & S. (Pa.) 276.

[4] Weir v. Pennington, 11 Ark. 745.

[5] Brice v. Taylor, 51 Ark. 75, 9 S. W. 854.

[6] Mayer v. Blease, 4 S. C. 10; Rice v. Troup, 62 Miss. 186; Clark v. Kingsland, 1 Smedes & M. (Miss.) 256; Head v. Gervais, 1 Walk. (Miss.) 431, 12 Am. Dec. 577; Wilson v. Wadleigh, 36 Me. 496; Maxwell v. Owen, 7 Cold. (Tenn.) 630.

[7] Peacock v. Pembroke, 8 Md. 348.

[8] Noble v. Thompson Oil Co., 79 Pa. 354, 21 Am. Rep. 66.

[9] Emory v. Joice, 70 Mo. 537.

[10] Capital Lumbering Co. v. Learned, 36 Or. 544, 59 Pac. 454, 78 Am. St. Rep. 792.

able, in a case where no execution comes to him for collec-
not per se void at common law.[11] It should be remembered
payment of a judgment by one primarily liable is an absolute
ion, though the judgment is assigned to him.[12] But a surety
debt for which the judgment was recovered may hold the
nt under an assignment, after paying to the clerk of the
e amount necessary to satisfy the judgment, if his intention
ay the judgment was clear.[13]

§ 942. What Judgments Assignable.

ugh a claim for damages arising out of the commission of a
not generally assignable, yet where the tort has become
in a judgment rendered upon it, such judgment may be
red by assignment, and the assignee may sue on the judg-
his own name.[14] It seems reasonable to hold that decrees
y for the payment of money should be assignable under the
strictions and with the same effect as judgments at law; but
cise question does not appear to have been passed upon by
rts.

§ 943. Agreement to Assign Future Judgment.

e case of actions ex contractu, a valid assignment may be
efore the rendition or entry of judgment, which will become
e as soon as the judgment is perfected. That is, the assign-
f a cause of action founded on breach of contract, or of a
recovered in the suit, carries the right to the judgment after-
recovered or entered up, so that the defendant at once be-
the debtor of the assignee and not of the record plaintiff.[15]

gh v. Huffer, 14 Ind. 305.
merman v. Gaumer, 152 Ind. 552, 53 N. E. 829.
lo-American Land Mortgage & Agency Co. v. Bush, 84 Iowa, 272, 50
063.
rles v. Haskins, 11 Iowa, 329, 77 Am. Dec. 148; Mackey v. Mackey,
(N. Y.) 58; Moore v. Nowell, 94 N. C. 265. See, also, Kessel v. Al-
Barb. (N. Y.) 362; Risley v. Phœnix Bank, 11 Hun (N. Y.) 484;
. Johnson, 5 Wend. (N. Y.) 342. A judgment recovered in a breach
se suit may be assigned. Stewart v. Lee, 70 N. H. 181, 46 Atl. 31.
ght v. Parks, 10 Iowa, 342; Rufe v. Commercial Bank, 40 C. C. A.

But it is otherwise in the case of actions for torts. A claim for damages from a tort (at least where it is such as would not survive to the personal representatives) is not capable of being assigned; nor does it make any difference that a verdict has been rendered in an action brought upon such claim, for that does not merge the claim nor transform its character.[16] Consequently a judgment in an action for such a tort is not assignable before it comes into being, that is, before it has been rendered or entered up, although a verdict has been returned on which judgment can be and is afterwards signed. The plaintiff acquires title not by the verdict, but by the judgment, and until its rendition he has no title to assign. Hence an assignment of the cause of action and verdict cannot have the effect to pass the subsequent judgment to the assignee. He has no interest in it, and payment to the judgment-plaintiff will satisfy it.[17]

§ 944. Assignment of Part of Judgment.

An assignment of a part of a judgment, without the consent of the debtor, cannot affect him; for the law sets its face against partial assignments of choses in action, and if this were allowed in the case of a judgment, it might be split up into many demands, to the great annoyance of the defendant.[18] Thus, in a recent case in Pennsylvania, plaintiff was the assignee of a part of a judgment, and the other part, remaining unpaid, was assigned to a third person. Plaintiff sought to obtain a separate judgment for his part of the original judgment by means of a scire facias, and to obtain an independent

27, 99 Fed. 650; Dignan v. Dignan (N. J.) 22 Atl. 1092; Bechtel v. Lauer Brewing Co., 21 Pa. Co. Ct. R. 449; Weire v. City of Davenport, 11 Iowa, 49, 77 Am. Dec. 132; Robinson v. Weeks, 6 How. Prac. (N. Y.) 161; Hudson v. Morriss, 55 Tex. 595; Dugas v. Mathews, 9 Ga. 510, 54 Am. Dec. 361.

[16] Comegys v. Vasse, 1 Pet. 213, 7 L. Ed. 108; Crouch v. Gridley, 6 Hill (N. Y.) 250; Kellogg v. Schuyler, 2 Denio (N. Y.) 73. But compare Mackey v. Mackey, 43 Barb. (N. Y.) 58; North Chicago St. R. Co. v. Ackley, 58 Ill. App. 572.

[17] Gamble v. Central R. & Banking Co., 80 Ga. 595, 7 S. E. 315, 12 Am. St. Rep. 276; Rice v. Stone, 1 Allen (Mass.) 566; Lawrence v. Martin, 22 Cal. 173. Compare Pratt v. Wertheimer, 39 Hun (N. Y.) 463.

[18] Love v. Fairfield, 13 Mo. 300, 53 Am. Dec. 148; Loomis v. Robinson, 76 Mo. 488; Burnett v. Crandall, 63 Mo. 410; Fullmer v. Pine Tp., 17 Pa. Co. Ct. R. 482.

o process for its collection. But it was held that the undivided ent could not be so separated into distinct parts.[19] But in :r case, where a debtor assigned to his creditor so much of a ent against a third person as would pay his debt, and placed dgment under the creditor's control, it was considered that signment was valid as against the debtor's personal represent- [20] It should also be observed that a partial assignment of a ent will be binding on the assignor even though made with- e consent of the judgment debtor; that the latter may ratify ial assignment of a judgment against him, and that he will d to have done so if he pleads the assignment as a defense to :dings by the judgment creditor to enforce it.[21] In some also, the doctrine prevails that an assignment of a part of a ent is enforceable in equity,[22] and in Minnesota, such an as- ent is valid if placed on the record as provided by the statute.[23] : one joint owner of a decree executes an instrument trans- ; to a third person a part of his interest therein, the legal title ght to control the decree are not thereby changed, nor does signee become a partner in the decree. Where such assign- is intended as a mode of payment for property purchased by signor, its legal effect is to create a security, and the assignor's y is not thereby extinguished.[24] So, where, in an action t two defendants, separate judgments are rendered against an assignment of the judgment against one defendant gives signee no power to release the other defendant.[25] Where parts : same judgment debt are successively assigned to different ıs, and, upon a sale of property under the judgment, the pro- are not sufficient to pay them all, they will take pro rata

opkins v. Stockdale, 117 Pa. 365, 11 Atl. 368.
ood v. Wallace, 24 Ind. 226. And see Godbold v. Kirkpatrick, 26 S. C. S. E. 156.
cMurray v. Marsh, 12 Colo. App. 95, 54 Pac. 852.
ne v. McCall, 126 Mich. 497, 85 N. W. 1089; Pittsburg, C., C. & St. L. . v. Volkert, 58 Ohio St. 362, 50 N. E. 924. And see Barnum v. Green,). App. 254, 57 Pac. 757.
heaton v. Spooner, 52 Minn. 417, 54 N. W. 372.
anks v. Harris, 29 Ark. 323.
'hittemore v. Judd Linseed & Sperm Oil Co., 124 N. Y. 565, 27 N. E. Am. St. Rep. 708.

shares in the fund, and not be paid in full in the order of the assignments.[26]

§ 945. Mode of Assignment.

An assignment of a judgment need not be under seal, nor is it necessary even that it should be in writing. It may be by parol, and will still be binding upon the parties if made in good faith and for a valuable consideration.[27] If the judgment-debtor, after notice of an equitable assignment by parol, receives a release of the debt from the judgment-creditor, he cannot successfully plead in bar to an action brought by the assignee to recover the amount of the judgment.[28] But in this case the intent to assign the judgment must be clearly shown.[29] Where the assignment is made on the record, a reasonable degree of certainty is required. But if the entry is so ambiguous as not to show whether an assignment or a satisfaction was intended, it may be explained by parol evidence.[30] An assignment of a judgment recovered in a United States court is not a "judicial proceeding," within the meaning of a statute giving full faith and credit to the judicial proceedings of the federal courts, when attested by the clerk and certified by the judge, and hence is

[26] Moore's Appeal, 92 Pa. 309.

[27] Briggs v. Dorr, 19 Johns. (N. Y.) 95; Prescott v. Hull, 17 Johns. (N. Y.) 284; Kessel v. Albetis, 56 Barb. (N. Y.) 362; Ford v. Stuart, 19 Johns. (N. Y.) 342; Clark v. Moss, 11 Ark. 736; Weir v. Pennington, Id. 745; Stoddard v. Benton, 6 Colo. 506; Brahan v. Ragland, 3 Stew. (Ala.) 247; Haden v. Walker, 5 Ala. 86; Becton v. Ferguson, 22 Ala. 599; Cravens v. Duncan, 55 Ind. 347; Wood v. Wallace, 24 Ind. 226; Mitchell v. Hockett, 25 Cal. 538, 85 Am. Dec. 151; Smith v. Peck, 128 Cal. 527, 61 Pac. 77; Bartlett v. Yates, 52 N. C. 615; Steele v. Thompson, 62 Ala. 323. Compare Dugas v. Matthews, 9 Ga. 510, 54 Am. Dec. 361; Parker v. Bacon, 26 Miss. 425; Winberry v. Koonce, 83 N. C. 351. In Texas, a judgment may be transferred by parol, but must be enforced in the name of the original plaintiff. Garvin v. Hall, 83 Tex. 295, 18 S. W. 731. And the statute of that state providing that the sale of a judgment of any court of record shall be evidenced by a written transfer, does not render void the verbal assignment of a judgment, as between the parties. Putnam v. Capps, 6 Tex. Civ. App. 610, 25 S. W. 1024. A judgment on a promissory note extinguishes its negotiability, and is only transferable as other credits are. Newman v. Irwin, 43 La. Ann. 1114, 10 South. 181.

[28] Dunn v. Snell, 15 Mass. 481.

[29] Thomas v. Porter, 3 Bush (Ky.) 177.

[30] Emory v. Joice, 70 Mo. 537.

ıissible in evidence without proper proof of its execution.[31]
o held that a written assignment of a judgment is not valid
orceable as against third persons without a delivery of the
ent to the assignee or to some one authorized by him to
t.[32] Authority to assign a judgment can be conferred by
ɔf attorney,[33] and the power of attorney need not be re-
[34] An assignment is not vitiated by mistakes in the descrip-
t can be shown what judgment was meant.[35] But whatever
f assignment is adopted, the assignment must be definitive
olute. Thus, the transfer of a judgment upon condition that
ısferee was to pay for it if he could make anything out of it
t invest him with such property in the judgment as will en-
ı to maintain an action upon it.[36]

§ 946. Statutory Mode of Assignment.

e the statute provides a mode of assigning judgments, it is
y considered to be merely cumulative, and not to prevent a
rom making an equitable assignment in any other lawful
Thus, where the statute enacts that judgments may be as-
"on or attached to the entry of such judgment, and the
ıent, when attested by the clerk of the court, shall vest the
tc., an assignment of a judgment, not attested as the statute
ı, is not void; it is at least good in equity, and vests such

ıderly v. Lafayette Co., 150 Mo. 635, 51 S. W. 745, 45 L. R. A. 386, 73
Rep. 474.
iams v. West Chicago St. R. Co., 85 Ill. App. 305. And see Baker
55 Hun, 605, 7 N. Y. Supp. 803.
y v. Morgan, 114 Ind. 350, 16 N. E. 790; Rufe v. Commercial Bank,
A. 27, 99 Fed. 650.
ı v. Morgan, 130 Ind. 305, 30 N. E. 141, 30 Am. St. Rep. 237.
lin v. Camack, 36 Ala. 695, 76 Am. Dec. 344; Aylesworth v. Brown,
(N. Y.) 167; People v. Fleming, 2 N. Y. 484; Klemme v. McLay, 68
S. 26 N. W. 53.
ı v. Bright, 29 Ala. 332. And see Vanderpool v. Vanderpool, 162 Pa.
tl. 910.
gess v. Cave, 52 Mo. 43. See Blackman v. Joiner, 81 Ala. 344, 1
51; Gardner v. Mobile & N. W. R. Co., 102 Ala. 635, 15 South.
Am. St. Rep. 84; Knapp, Stout & Co. v. Standley, 45 Mo. App. 264;
Loring, 54 Mo. App. 258; Chemical Bank v. Bulkley, 68 Mo. App. 327;
Maddox, 20 Ind. App. 169, 49 N. E. 856.

title in the assignee as will enable him to use it as a set-off to a judgment held by the defendant against him.[38] Where a state statute, in reference to the assignment of judgments, is so worded as to embrace only judgments rendered in the courts of that state, an assignment of a judgment recovered in another state may be proved by a written instrument transferring to the assignee the equitable interest in the debt, and he may sue upon it in his own name and for his own benefit.[39]

§ 947. Equitable Assignment.

Where a judgment creditor sells his judgment and attempts to assign it upon the record to the purchaser, but by mistake the assignment is made upon the wrong record, it nevertheless operates as an equitable assignment.[40] So also the transfer of property will in some cases operate as an assignment of a judgment. Thus, where A. recovered judgment for possession in an action for the recovery of real property against B., and afterwards sold the property to C. without assigning the judgment on the record, it was held that C., by the purchase of the property, became the real party in interest, and could properly revive the judgment by scire facias.[41] Again, where a plaintiff in a judgment gives to a creditor an order on his attorney to pay to him the money collected by the attorney on the judgment, which order the creditor delivers to the attorney, it creates an equitable assignment of and lien on the proceeds of the judgment, and the attorney holds the same in trust for the creditor, and such assignment cannot be revoked by the judgment-plaintiff.[42] So when a person having a future interest in property on which there is a judgment-lien, for the purpose of protecting such interest, pays the debt of the judgment-debtor, he thereby becomes an equitable assignee of the judgment and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit.[43] In some

[38] Adams v. Lee, 82 Ind. 587.

[39] Baker v. Stonebraker, 34 Mo. 172.

[40] Frybarger v. Andre, 106 Ind. 337, 7 N. E. 5.

[41] Wright v. Parks, 10 Iowa, 342.

[42] Hussey v. Culver, 53 Hun, 637, 6 N. Y. Supp. 466. But compare Teetor v. Abden, 2 Ind. 183.

[43] Sutton v. Sutton, 26 S. C. 33, 1 S. E. 19.

tates, a judgment, as property, may be taken in execution .[44] But according to other authorities, the judgment-cred- terest can be reached only by summoning the judgment- s garnishee.[45]

§ 948. Title Passing to Assignee.

nmon law, the assignment of a judgment does not vest the e in the assignee; that remains in the judgment-creditor, o the equitable rights of the assignee.[46] But the cases gen- ree that the assignment carries with it the debt or claim on e judgment was based,[47] and the right to stand in the cred- ce as regards the means of its collection and enforcement,[48] with any incidental rights or advantages, existing at the :h as the benefit of an appeal-bond.[49] And the assignee's 'e not affected by the fact that the consideration was less face of the judgment;[50] nor even by fraud in the trans- ss the judgment-debtor can show that he was injured by ıd.[51]

tree v. Missouri, I. & N. Ry. Co., 49 Iowa, 150; Safford v. Maxwell, n. 345; Adams v. Hackett, 7 Cal. 187.

n v. Cloud, 23 Iowa, 104, 92 Am. Dec. 413; McBride v. Fallon, 65 Pac. 17.

ıck v. Underwood, 55 Ill. 123; Hanks v. Harris, 29 Ark. 323; Hewett ., 37 N. C. 438.

v. Crosby, 49 N. Y. 183; Elsworth v. Caldwell, 18 Abb. Prac. (N. :att v. Wertheimer, 39 Hun (N. Y.) 463; Vila v. Weston, 33 Conn. If the judgment was void, the assignment transfers the original ıwn v. Scott, 25 Cal. 189.

ı v. Bangert, 16 Mo. App. 22; Applegate v. Mason, 13 Ind. 75; v. First State Bank, 102 Ga. 696, 29 S. E. 610; Avery v. Ackart, 20 631, 46 N. Y. Supp. 1085. See infra, § 951.

ınn v. Kline, 87 Ill. 268. But probably not a bond in attachment. O'Donnell, 42 Mich. 556, 4 N. W 259. And the mere assignment of ıt does not carry with it a right of action which has accrued to the creditor against the clerk of the court for his failure properly to judgment. so as to give it a lien on the debtor's lands. Redmond v. 3 N. C. 140, 21 S. E. 186.

ıon v. Hope, 87 N. Y. 10. Inglehart v. Thousand Island Hotel Co., '. Y.) 377. Compare Campion v. Friedberg, 55 Ill. App. 450.

v. Klein, 35 La. Ann. 384.

§ 949. Rights as against Assignor.

The assignor of a judgment must be held to an implied warranty that there is such a judgment, that he is the owner of it, that it is a valid and subsisting obligation for the amount it purports to be, and that no part thereof has been paid.[52] This rests upon the presumed superior knowledge of the vendor as to the condition of the debt and as to any payments that may have been made upon it. He must in ordinary cases have better means of knowing the facts than the purchaser. There may undoubtedly be cases to which this presumption would not apply; as when a judgment is transferred to one who has had charge of its collection, under such circumstances as would raise a presumption that he was privy to the payments. But these cases are exceptions to the rule.[53] But a transfer by an assignee of the judgment, ignorant of any defect therein or defense thereto, of simply his "right, title, and interest therein, without recourse," will not render him liable upon a similar implied warranty.[54] And in an assignment of a judgment there is no implied warranty of the solvency of the judgment-debtor. Where the assignee has pursued the debtor to insolvency and failed to collect the amount, the assignor is under no liability to refund the consideration, unless by express agreement.[55] Of course the judgment-creditor, after the assignment, cannot receive payment of the judg-

[52] Miller v. Dugan, 36 Iowa, 433; Lile v. Hopkins, 12 Smedes & M. (Miss.) 299. 51 Am. Dec. 115; Furniss v. Ferguson, 15 N. Y. 437; Emerson v. Knapp, 75 Mo. App. 92; Johnson v. Boice, 40 La. Ann. 273, 4 South. 163, 8 Am. St. Rep. 528. A warranty that the judgment assigned is valid is broken by the transfer of a voidable judgment; and hence, where the judgment is afterwards set aside by the decision of an appellate court, the purchaser may recover the purchase price from the assignor. Emerson v. Knapp, 75 Mo. App. 92.

[53] Furniss v. Ferguson, 15 N. Y. 437.

[54] Miller v. Dugan, 36 Iowa, 433; Scofield v. Moore, 31 Iowa, 241. And see Gore v. Poteet, 101 Tenn. 608, 50 S. W. 754. In Mississippi, it is said that the rule of caveat emptor applies to the purchaser of a judgment as well as to purchasers of other classes of personal property. Cox v. Palmer, 60 Miss. 793.

[55] Robinson's Adm'x v. White, 4 Litt. (Ky.) 235; Reid v. Ross, 15 Ind. 255; Mohler's Appeal, 5 Pa. 418, 47 Am. Dec. 413; Findley v. Smith, 42 W. Va. 299, 26 S. E. 370.

or enter satisfaction of it. "A party who, after having for a ble consideration assigned a judgment, satisfies it, clearly in- a liability to his assignee. If the satisfaction-piece is given on ent of the judgment, the money may be recovered by the as- e in an action for money had and received, and if the satis- n is given without payment, and the assignee is prejudiced there- : is entitled to recover of his assignor the damages sustained." [56] ın assign ıent of his judgment by a judgment-creditor to his ıey, for reasons of convenience, and for his own benefit, cannot il against a subsequent settlement by him with the judgment- r.[57]

§ 950. Notice of Assignment.

: judgment-debtor must have notice of the assignment. He e protected, as against the assignee, in respect to any payments ıy make to the plaintiff in the judgment before receiving such .[58] On the other hand, it is well settled that after notice to ebtor of a bona fide transfer of the judgment, the rights of signee will be protected from any and all acts of the parties.[59]

ɔoth v. Farmers' & Mechanics' Nat. Bank, 50 N. Y. 396.
ıker v. Secor, 55 Hun, 605, 7 N. Y. Supp. 803.
ıullagher v. Caldwell, 22 Pa. 300, 60 Am. Dec. 85; Lee v. Delehanty, ı (N. Y.) 197; Noble v. Thompson Oil Co., 79 Pa. 354, 21 Am. Rep. 66; l v. Haile, 18 Mo. 18; Dodd v. Brott, 1 Minn. 270 (Gil. 205), 66 Am. 41; Page v. Benson, 22 Ill. 484; Styles v. McNeil's Heirs, 6 Mart. N.) 296, 17 Am. Dec. 183; Johnson v. Boice, 40 La. Ann. 273, 4 South. Am. St. Rep. 528; Commonwealth v. Burnett (Ky.) 44 S. W. 966; l v. Ford (Tenn.) 46 S. W. 581; Clark v. Baltimore & O. R. Co., 3 . P. 172; Ihorn v. Wallace, 88 Ill. App. 562. But in some states it that where the judgment-debtor, being summoned as garnishee in on against the judgment-creditor, has paid to the sheriff the amount ı the judgment, without notice of its previous assignment, he is ıtected from the claims of the assignee of the judgment. Robinson ·ks, 6 How. Prac. (N. Y.) 161; Richardson v. Ainsworth, 20 How. N. Y.) 530; Brown v. Ayres, 33 Cal. 525, 91 Am. Dec. 655. But a ıt rule obtains in other states. Drumm v. Sherman, 20 La. Ann. 96. e Garey v. Sangston, 64 Md. 31, 20 Atl. 1034. As against an attach- ditor seeking to subject a judgment to the payment of his claims, no- the judgment defendant of an assignment of it is not necessary to the assignee's right to the proceeds of the judgment. Hutchinson v. 8 App. D. C. 157.
ɔddard v. Benton, 6 Colo. 508, Ullmann v. Kline, 87 Ill. 268; Hughes

It is not necessary that direct notice of the assignment be given by the assignee; it is sufficient if the information is given under circumstances and in terms calculated to arrest the attention of the debtor. Or, as the rule is otherwise stated, it is necessary that the debtor should either have actual notice of the assignment or notice of such facts as suffice to put him upon inquiry.[60] Where the judgment debtor hears mere reports or rumors to the effect that the judgment has been assigned to some person not named, and applies to the judgment creditor for information on the point, who declines to tell him, there is no such notice to him as the rule contemplates.[61] Also it is held that the mere entry of the assignment on the record of the judgment is not constructive notice to the debtor. "He is under no obligation to make inquiry. A subsequent incumbrancer or purchaser must know, for it is his duty to examine the records. Not so with the debtor himself. The judgment docket is not for his benefit." [62]

§ 951. Right of Assignee to Sue.

Although, at common law, as we have already stated, the assignee of a judgment was not regarded as invested with the legal title, and therefore was not competent to sue thereon in his own name, this rule has been abrogated by statute in many states, and now the assignee is the only proper party to maintain an action on the judgment or to sue out scire facias for its revival.[63] The new rule, how-

v. Trahern, 64 Ill. 48; Germania Life Ins. Co. v. Koehler, 59 Ill. App. 592; Laughlin v. Fairbanks, 8 Mo. 367; Pittsburg, C., C. & St. L. Ry. Co. v. Volkert, 58 Ohio St. 362, 50 N. E. 924.

[60] Guthrie v. Bashline, 25 Pa. 80; Clark v. Baltimore & O. R. Co., 7 Ohio N. P. 647. Where a judgment debtor became surety for the prosecution of a bill to enjoin the judgment against him, and the bill contained an allegation of the assignment of the judgment, it was held that he was charged with notice of the assignment. Wilcox v. Morrison, 9 Lea (Tenn.) 699.

[61] The Lulie D., 4 Biss. 249, Fed. Cas. No. 8,602.

[62] Henry v. Brothers, 48 Pa. 70; Clark v. Baltimore & O. R. Co., 8 Ohio N. P. 172; Steiner v. Scholze, 114 Ala. 88, 21 South. 428; Miller v. Baltimore & O. R. Co., 60 Ohio St. 374, 54 N. E. 369; Chicago City Ry. Co. v. Blanchard, 37 Ill. App. 391.

[63] Edmonds v. Montgomery, 1 Iowa, 143; Charles v. Haskins, 11 Iowa, 329, 77 Am. Dec. 148; Steele v. Thompson, 62 Ala. 323; Moore v. Nowell,

; not universal. Thus, in Alabama, it is held that a judgment a "contract express or implied, for the payment of money," the meaning of the statute which requires an action on such :t to be brought in the name of the real party in interest, and ıre, in that state, an action on a judgment is still properly t, notwithstanding its assignment, in the name of the orig- ıintiff.[64] The assignee of a judgment founded on a contract maintain a suit thereon in a court of the United States, un- :h a suit might be there prosecuted had the assignment not ade.[65]

§ 952. Rights as against Judgment-Debtor.

ıssignment of a judgment carries with it to the assignee all ıts and advantages incident thereto, as against the judgment- including the right of proceeding with an attachment already [66] The assignee has all the equitable remedies of the plain- he judgment.[67] But the assignment does not pass any in- n the money which the sheriff had previously collected on ;ment.[68] And where one of several joint wrong-doers pays gment obtained against them all, he acquires no right of ıtion by taking an assignment of the judgment in the name ıer, who is merely a man of straw.[69]

265; Clark v. Digges, 5 Gill (Md.) 109; Murphy v. Cochran, 1 Y.) 339; Benne v. Schnecko, 100 Mo. 250, 13 S. W. 82; Ware v. t & B. R. Co., 69 Me. 97; Moore v. Smith, 103 Mich. 387, 61 N. Willett v. Clark, 61 N. J. Law, 696, 44 Atl. 515. See Timberlake . 99 N. C. 233, 5 S. E. 410.

ı v. Eberlein, 74 Ala. 99, 49 Am. Rep. 809. See Moorer v. Moorer, 45, 6 South. 289. Supra, vol. 1, § 11.

ıer v. Powers, 104 U. S. 245, 26 L. Ed. 729. See Act Cong. March 24 Stat. 552); Dill. Rem. Causes, § 100.

ood v. Dehoney, 5 Bush (Ky.) 174; Perry v. Roberts, 30 Ind. 244, ec. 689; Parmelee v. Dann, 23 Barb. (N. Y.) 461; Bolen v. Crosby, 183; Ritch v. Eichelberger, 13 Fla. 169; Richmond Bldg. Ass'n v. l Bldg. Ass'n, 100 Pa. 191; Van Houten v. Reily, 6 Smedes & M. 0; Burson v. Blair, 12 Ind. 371.

ıle v. Cummins, 3 Metc. (Ky.) 327.

ns n v. Towns, 30 Ga. 818.

r v. B lender, 129 Pa. 324, 18 Atl. 127, 15 Am. St. Rep. 723.

§ 953. Assignee Takes Subject to Equities.

The assignee of a judgment takes it subject to all the equities subsisting between the original parties, whether he had notice of the same or not; he can occupy no better position, and acquire no firmer rights, than his assignor possessed.[70] For instance, the assignee takes the judgment subject to any right of set-off which existed in the judgment-debtor prior to the assignment, no matter whether he had notice of such right or not.[71] And in respect to a lien on property for the satisfaction of the judgment, he can occupy no better position than the assignor.[72] So where the assignee has notice of a certain agreement, relative to the enforcement of the judgment, between the parties thereto, he takes subject to that agreement, and cannot set it aside for fraud of the defendant in obtaining it, whatever rights his assignor may have had.[73] The assignee is a

[70] Downer v. South Royalton Bank, 39 Vt. 25; Shelton v. Hurd, 7 R. I. 403, 84 Am. Dec. 564; Graves v. Woodbury, 4 Hill (N. Y.) 559, 40 Am. Dec. 296; McCotter v. McCotter, 16 Abb. Prac. (N. Y.) 265; Filbert v. Hawk, 8 Watts (Pa.) 443; Starr v. Haskins, 26 N. J. Eq. 414; Stout v. Van Kirk, 10 N. J. Eq. 78; Lattomus v. Garman, 3 Del. Ch. 232; Rawson v. McJunkins, 27 Ga. 432; Scott v. Harkins, 32 Ga. 302; Mayor, etc., of Wetumpka v. Wetumpka Wharf Co., 63 Ala. 611; Robeson v. Roberts, 20 Ind. 155, 83 Am. Dec. 308; Burson v. Blair, 12 Ind. 371; Porter v. Bagby, 50 Kan. 412, 31 Pac. 1058; Hayes v. Carr, 44 Hun (N. Y.) 372; Noble v. Thompson Oil Co., 79 Pa. 354, 21 Am. Rep. 66; Yarnell v. Brown, 65 Ill. App. 83; Weber v. Tschetter, 1 S. D. 205, 46 N. W. 201; Commonwealth v. Burnett (Ky.) 44 S. W. 966; Boggs v. Douglass, 105 Iowa, 344, 75 N. W. 185; Fleming v. Stansell, 13 Tex. Civ. App. 558, 36 S. W. 504; Minnesota Thresher Manuf'g Co. v. Holz, 10 N. D. 16, 84 N. W. 581; Rea v. Forrest, 88 Ill. 275; Hughes v. Trahern, 64 Ill. 48; McJilton v. Love, 13 Ill. 486, 54 Am. Dec. 449; Burtis v. Cook, 16 Iowa, 194; Isett v. Lucas, 17 Iowa, 503, 85 Am. Dec. 572; Independent School Dist. v. Schreiner, 46 Iowa, 172; Blakesley v. Johnson, 13 Wis. 530; Brisbin v. Newhall, 5 Minn. 273 (Gil. 217); Porter v. Liscom, 22 Cal. 430, 83 Am. Dec. 76. See Cook v. McCahill, 41 N. J. Eq. 69, 3 Atl. 82.

[71] Graves v. Woodbury, 4 Hill (N. Y.) 559, 40 Am. Dec. 296; Porter v. Liscom, 22 Cal. 430, 83 Am. Dec. 76; Hobbs v. Duff, 23 Cal. 596; Neal v. Sullivan, 10 Rich. Eq. (S. C.) 276; Ellis v. Kerr, 11 Tex. Civ. App. 349, 32 S. W. 444; Hibbard v. Randolph, 72 Hun, 626, 25 N. Y. Supp. 854. See Dutton v Mason, 21 Tex. Civ. App. 389, 52 S. W. 651.

[72] Rider v. Kelso, 53 Iowa, 367, 5 N. W. 509.

[73] Borst v. Baldwin, 30 Barb. (N. Y.) 180.

sary party to a suit for a perpetual stay of the proceedings on ıdgment upon the ground of equities existing between the ainant and the assignor previous to the assignment.[74] Where gment once paid, but not satisfied of record, is assigned by dgment-creditor, the assignee takes it subject to all defenses quities which the judgment-debtor had against the assignor.[75]

§ 954. Set-Off of Judgment against Judgment.

a deduction from the rule that the assignee of a judgment it subject to all the equities subsisting between the original , many of the cases sustain the doctrine that one judgment e set off against another, although one of the judgments has ssigned to a third person for a valuable consideration and t notice of the existence of the other judgment, provided the f set-off existed at the time of the assignment.[76] Other de- without going to this length, hold that such judgments may off where one of them was fraudulently assigned for the very e of preventing such offset.[77] And others go no further than ıre that if the assignee has notice of the other judgment, he e subject to the equitable right to set it off.[78] Still another that the equity in question cannot prevail over the assign- nless the assignor was insolvent at the time of the assign- But a considerable proportion of the authorities take the

ford v. Sprague, 11 Paige (N. Y.) 438.
hagen v. Lyons, 38 N. J. Eq. 613; Stout v. Van Kirk, 10 N. J. Sutton v. Sutton, 26 S. C. 33, 1 S. E. 19. Compare Doub v. Mason, 2

es v. Woodbury, 4 Hill (N. Y.) 559, 40 Am. Dec. 296; Peirce v. Me. 381; Hovey v. Morrill, 61 N. H. 9, 60 Am. Rep. 315; Chase vard, 61 N. H. 79; Langston v. Roby, 68 Ga. 406; Hendrickson , 39 N. J. Law, 239; Whitehead v. Jessup, 7 Colo. App. 460, 43 ; Benson v. Haywood, 86 Iowa, 107, 53 N. W. 85, 23 L. R. A. 335; . Cuppy (Iowa) 82 N. W. 1016; Hobbs v. Duff, 23 Cal. 596; Porter , 22 Cal. 430, 83 Am. Dec. 76; Merrill v. Souther, 6 Dana (Ky.) 305; . Fallon, 65 Cal. 301, 4 Pac. 17; Yorton v. Milwaukee, L. S. & W. 2 Wis. 367, 23 N. W. 401; Wells, Fargo & Co. v. Clarkson, 5 Mont. . 894; Orr v. Sp oner, 19 U. C. Q. B. 601.
v. Sheets, 14 Iowa, 322.
v. Myers, 6 Minn. 562 (Gil. 398); Skinker v. Smith, 48 Mo. App. 91. rson v. McVey, 32 Ala. 471; Davis v. Milburn, 3 Iowa, 168.

broad ground that the right to set off judgments is permitted only where it will infringe on no other right of equal grade, and further, that an assignment of one of the judgments destroys that mutuality which is an essential condition to the right of set-off, and consequently, that this equity will not be permitted to affect an assignee for value and in good faith.[80] Most of the cases seem to agree in the rule that where a judgment recovered by the plaintiff has been assigned to his attorney in good faith, in payment for his services in the action, the court should refuse to set off against such judgment a judgment recovered by defendant against plaintiff prior to the assignment, but of which the attorney had then no notice.[81]

§ 955. Vacation or Reversal of Judgment in Assignee's Hands.

The assignee of a judgment stands in no better position than the original plaintiff, and the judgment may be reversed, vacated, set aside, or enjoined in the assignee's hands for the same reasons that would justify such action if it remained in the hands of the plaintiff.[82] And when proceedings are instituted for any of these purposes, the assignor is not a proper or necessary party, as he has no longer an interest in the judgment.[83] Upon the reversal of the judgment, the assignee, if he has purchased property under his own execution, will lose his title thereto.[84] So if he has acquired rights

[80] Ramsey's Appeal, 2 Watts (Pa.) 228, 27 Am. Dec. 301; Goodwin v. Richardson, 44 N. H. 125; Primm v Ransom, 10 Mo. 444; Ledyard v. Phillips, 58 Mich. 204, 24 N. W. 551; Gallaher v. Pendleton, 55 Iowa, 142, 7 N. W. 512; Bell v. Perry, 43 Iowa, 368; In re Wells, 43 S. C. 477, 21 S. E. 334; Holly v. Cook, 70 Miss. 590, 13 South. 228; Matthews v. Russell, 17 Pa. Co. Ct. R. 590.

[81] Simmons v. Reid, 31 S. C. 389, 9 S. E. 1058, 17 Am. St. Rep. 36; Terney v. Wilson, 45 N. J. Law, 282; Ely v. Cooke, 28 N. Y. 365. Compare Yorton v. Milwaukee, L. S. & W. Ry. Co., 62 Wis. 367, 23 N. W. 401; Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786; Crecelius v. Bierman, 72 Mo. App. 355.

[82] Weber v. Tschetter, 1 S. D. 205, 46 N. W. 201; Northam v. Gordon, 23 Cal. 255. Compare Reynolds v. Reynolds Lumber Co., 175 Pa. 437, 34 Atl. 791.

[83] Ritch v. Eichelberger, 13 Fla. 169; Ellis v. Kerr (Tex. Civ. App.) 23 S. W. 1050.

[84] Reynolds v. Harris, 14 Cal. 667, 76 Am. Dec. 459.

· the judgment, and it is subsequently reversed, he must make ution, the same as if he were an original party.[85]

§ 956. Latent Equities of Third Persons.

several of the authorities we find the statement that the rule eat emptor applies to the purchaser of a judgment as well as chasers of other classes of personal property.[86] But the gen- recognized doctrine is that the assignee of a judgment is not d by the latent equities of third persons, not parties to the ent, of which he had no notice at the time of the assignment.[87] arty proposing to take an assignment of a judgment can go judgment-debtor and ascertain the true state of the case. If tor have any equitable ground for refusing to pay, he can ; if not, and he so state to the party proposing to take an ent, and the purchase is made on the faith of such disclaimer, be thereafter estopped to set up any such matter. But a oposing to purchase a judgment has no means of ascertain- t claims third persons may have, or pretend to have, on ment, unless such claims appear on or attached to the entry nent where the same is to be assigned. Hence it would t an assignee without notice should take the judgment freed claims of such third persons."[88] In accordance with this , it is held that while an unrecorded deed to lands takes ce of a judgment as against the judgment-creditor, if before ery of his judgment he has actual notice of the conveyance ebtor, yet the assignee of such judgment, who buys with- e that his assignor had notice before the rendition of the

on v. Love, 13 Ill. 486, 54 Am. Dec. 449.
. Palmer, 60 Miss. 793; Mitchell v. Hockett, 25 Cal. 538, 85 Am.

t v. Levy, 12 Cal. 257; McCotter v. McCotter, 16 Abb. Prac. (N. Y.)
v. First Nat. Bank, 50 Iowa, 642; Starr v. Haskins, 26 N. J. Eq
ty v. Lylburn, 2 Johns. Ch. (N. Y.) 442; Hendrickson's Appeal,
Greene v. Darling, 5 Mason, 214, Fed. Cas. No. 5,765; Garland
, 17 Mo. 282; Ives v. Addison, 39 Kan. 172, 17 Pac. 797; Wright
Ohio Cir. Ct. R. 86; Le Duc v. Slocomb, 124 N. C. 347, 32 S. E.
hompson v. Noble, 55 Hun, 268, 8 N. Y. Supp. 373.
n v. Roberts, 20 Ind. 155, 161, 83 Am. Dec. 308.

judgment of the conveyance, is not affected by the notice to his assignor.[89] So the equity of a purchaser for value of a judgment, which is a lien upon certain real estate, is at least equal to the equitable claim of the owner of such real estate to be subrogated to the rights of a mortgagee in a mortgage thereon which has been paid off and satisfied, and of which the purchaser of the judgment had no actual knowledge, and where the equities are equal the law must prevail.[90] Again, the bona fide assignee of a judgment is not affected in his right to enforce the same by an agreement between the judgment-debtor and another creditor, that he will pay off the judgment if the creditor will accept a conveyance of his property, and credit him therefor with a certain amount upon his indebtedness, the assignee having no notice of such agreement.[91] So again, an agreement between the seller and purchaser of a judgment, that its lien shall be superior to that of a prior judgment against the same parties held by the seller, cannot be set up against a subsequent purchaser for value of the prior judgment, no notice, actual or constructive, of the agreement being given to such purchaser.[92] The bona fide assignee for valuable consideration of a judgment confessed to indemnify the plaintiff as surety on certain notes given by the defendant to a third person, takes free and discharged of the equity of that person to have the fruits of the judgment applied on account of the payment of the notes; nor is there any obligation on the part of such assignee to make inquiry as to the existence of such an equity.[93]

The foregoing rule, however, is subject to certain important qualifications. In the first place, the purchaser of a judgment is ordinarily charged with an inspection of the record of that judgment, and is therefore affected with notice of any rights which it plainly discloses.[94] Again, some of the cases hold that he is not entitled to the protection of a bona fide purchaser unless he has actually

[89] Duke v. Clark, 58 Miss. 465, 474.

[90] Ritter v. Cost, 99 Ind. 80

[91] Starr v. Haskins, 26 N. J. Eq. 414.

[92] Winton's Appeal (Pa.) 5 Atl. 433.

[93] Mifflin County Nat. Bank's Appeal, 98 Pa. 150.

[94] Griffiths v. Sears, 112 Pa. 523, 4 Atl. 492. Foltz v. Wert. 103 Ind. 404 2 N. E. 950.

ıe purchase-money before the adverse equity is asserted.[95]
, after the assignment and after notice to the debtor, the
ɔr wrongfully enters satisfaction of the judgment, the assignee
ave the entry set aside, but he will not be permitted to take
dings to injure rights acquired by third persons upon the faith
entry of satisfaction.[96] So again, under proper circumstances,
ɔrney's lien upon a judgment will be held superior to the
ɔf an assignee.[97] In a case where a debtor, while in failing
stances, confessed a judgment to his brother, which was then
ɜd to a creditor of the debtor, who, in consideration of his
ıl claim and the judgment so acquired, took a bill of sale of
ɜets of the debtor, it was held, in a suit by other creditors to
de the judgment and sale as fraudulent, that the judgment
be treated as overdue paper, and the creditor took it subject
equities.[98] And cases are not wanting which even hold that
signee of a judgment takes it subject to all equities, in favor
d persons as well as between the original parties, and whether
es with or without notice.[99]

§ 957. Priority between Assignments.

doctrine favored by a majority of the decisions is that an
ee of a judgment takes no title if his assignor had previously
ed the same judgment to another party, whether or not he
ɔtice of such previous assignment.[100] But it has also been
ıat a second purchase of a judgment, evidenced by a transfer
record, would pass title against a prior purchase not recorded
which the second purchaser was ignorant.[101] If a judgment

ristie v. Bishop, 1 Barb. Ch. (N. Y.) 105.
ebe v. Bank of New York, 1 Johns. (N. Y.) 528, 3 Am. Dec. 353;
l v. Eden, 2 Johns. Cas. (N. Y.) 258.
ll v. Truelsen, 39 Minn. 373, 40 N. W. 254.
ınchett v. Kimbark, 118 Ill. 121, 7 N. E. 491.
wner v. South Royalton Bank, 39 Vt. 25; De La Vergne v. Evertson, 1
N. Y.) 181, 19 Am. Dec. 411; Wise v. Shepherd, 13 Ill. 41.
itchell v. Hockett, 25 Cal. 538, 85 Am. Dec. 151; Clarke v. Hogeman,
Va. 718; Dinsmore v. Boyd, 6 Lea (Tenn.) 689; Thompson v. Jones,
, 268, 8 N. Y. Supp. 373. Compare Stanford v. Connery, 84 Ga. 731,
. 507.
ampbell's Appeal, 29 Pa. 401, 72 Am. Dec. 641.

is assigned by its owner, and afterwards levied on and sold as his property, the right of the assignee is prior to that of the purchaser at the sheriff's sale.[102] The rightful assignee of a judgment may enjoin the collection of the same by one who claims the same judgment by a simulated assignment.[103]

[102] Fore v. Manlove, 18 Cal. 436. Compare Cole v. Brewer, 4 Lea (Tenn.) 318. See Hutchinson v. Brown, 8 App. D. C. 157.

[103] Klein v. Dennis, 36 La. Ann. 284.

CHAPTER XXIV.

ACTIONS UPON JUDGMENTS.

udgment as a Cause of Action.
udgment must be Final and in Force.
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udgments of Inferior Courts.
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Interest on Judgments.
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Mandamus to Enforce Judgments against Municipal Corporations.
Same; Power of Federal Courts.
Same; Prerequisites to Issuance of Writ.
Same; Defenses; Impeachment of Judgment.
Same; Execution of Writ.
Same; Effect of Limitation of Taxing Power of Municipality.

§ 958. Judgment as a Cause of Action.

ıe common law, an action of debt will lie on a judgment as it is recovered, and without any regard to the plaintiff's right out execution; for the remedy by execution is cumulative

merely, and the statutes giving this remedy do not impair the common law right of action on the judgment as a debt of record. Accordingly, in a majority of the states, the owner of a judgment may bring suit thereon in the same or any other court of competent jurisdiction, and prosecute it to final judgment, notwithstanding the collection of the original judgment might still have been enforced by execution, and even although an execution is then outstanding.[1] Thus, an action may be maintained upon a judgment, although an alias execution was issued thereon after the commencement of such ac-

[1] Hickman v. Macon Co. (C. C.) 42 Fed. 759; Whittemore v. Carkin, 58 N.H. 576; Morse v. Pearl, 67 N. H. 317, 36 Atl. 255, 68 Am. St. Rep. 672; White River Bank v. Downer, 29 Vt. 332; Clark v. Goodwin, 14 Mass. 237; O'Neal v. Kittredge, 3 Allen (Mass.) 470; Linton v. Hurley, 114 Mass. 76; Wilson v. Hatfield, 121 Mass. 551; Denison v. Williams, 4 Conn. 402; Ives v. Finch, 28 Conn. 112; Hale v. Angel, 20 Johns. (N. Y.) 342; Goodrich v. Colvin, 6 Cow. (N. Y.) 397; Church v. Cole, 1 Hill (N. Y.) 645; Smith v. Mumford, 9 Cow. (N. Y.) 26; Harris v. Steiner, 30 Misc. Rep. 624, 62 N. Y. Supp. 752; Stewart v. Peterson's Ex'rs, 63 Pa. 230; Harter v. Harter, 4 Pa. Dist. R. 211; Fullmer v. Pine Tp., 17 Pa. Co. Ct. R. 482; Lawton v. Perry, 40 S. C. 255, 18 S. E. 861; Copeland v. Todd, 30 S. C. 419, 9 S. E. 341; Kingsland v. Forrest, 18 Ala. 519, 52 Am. Dec. 232; Elliott v. Holbrook, 33 Ala. 659; Field v. Sims, 96 Ala. 540, 11 South. 763; Succession of Ducker, 10 La. Ann. 758; Hull v. Naumberg, 1 Tex. Civ. App. 132, 20 S. W. 1125; Stevens v. Stone, 94 Tex. 415, 60 S. W. 959; Gardner v. Henry, 5 Cold. (Tenn.) 458; Burnes v. Simpson, 9 Kan. 658; Hummer v. Lamphear, 32 Kan. 439, 4 Pac. 845, 49 Am. Rep. 491; Headley v. Roby, 6 Ohio, 521; Davidson v. Nebraker, 21 Ind. 334, 83 Am. Dec. 350; Gould v. Hayden, 63 Ind. 443; Becknell v. Becknell, 110 Ind. 42, 10 N. E. 414; Greathouse v. Smith, 3 Scam. (Ill.) 541; Albin v. People, 46 Ill. 372; Haven v. Baldwin, 5 Iowa, 503; Thomson v. Lee County, 22 Iowa, 206; Simpson v. Cochran, 23 Iowa, 81, 92 Am. Dec. 410; Woods v. Ayres, 39 Mich. 345, 33 Am. Rep. 396; Eldredge v. Aultman, Miller & Co., 35 Neb. 884, 53 N. W. 1008, 37 Am. St. Rep. 476; Mandlebaum v. Gregovich, 24 Nev. 154, 50 Pac. 849; Ames v. Hoy, 12 Cal. 11; Stuart v. Lander, 16 Cal. 372, 76 Am. Dec. 538; Bettman v. Cowley, 19 Wash. 207, 53 Pac. 53, 40 L. R. A. 815. In Michigan, an action of debt will lie upon a justice's judgment immediately upon its rendition, although execution has been stayed. McDonald v. Butler, 3 Mich. 558. So, where excessive costs have been awarded by a justice in giving judgment, and the judgment debtor does not appeal, the party recovering judgment is entitled to rectify the error by remitting the costs and suing again upon the judgment for damages. Whelpley v. Nash, 46 Mich. 25, 8 N. W. 570. As to whether an action can be maintained in a federal court on a money judgment recovered in a court of the same state wherein the federal court is sitting, see Barr v. Simpson, Baldw. 543, Fed. Cas. No. 1,038; Davis v. Davis (C. C.) 65 Fed. 380.

ınd an action to recover the amount of a judgment, with
in which a summons is issued and served as on a money
is an action on the judgment, and not an action to revive
ollows also, as a corollary to the proposition above stated,
vitality of a judgment is not exhausted by one action thereon,
creditor is entitled to pursue successive actions until satis-
obtained.[4]

ıot be said, however, that this rule is universally accepted
esent day. Some states, having a regard to the oppressive
ious character of a succession of unnecessary suits upon the
gation, refuse to allow the maintenance of such actions with-
owing of some special and adequate cause. Thus in Oregon,
that a judgment-creditor cannot sue upon the judgment as
e may choose, without showing any necessity therefor, the
ared that "neither the common law, nor the practice in the
ates, nor anything inherent in the subject, gives the judg-
itor an absolute right of action on a domestic judgment,
h action is necessary in order to enable the plaintiff to
full benefit of his judgment."[5] In New York, it is said
ıugh, as a general rule, a judgment plaintiff may sue on
ent, yet a court will not allow its process to be perverted;
several suits have been brought upon successive judg-
different courts, for the avowed purpose of coercing pay-
ncreasing costs, it is proper for the court in which the
s brought to order a stay of execution in all the cases
e been brought in that court except the first.[6] In Ken-
provided by statute that no action shall lie upon a judg-
pt one to enforce the collection thereof.[7] In South Car-
ction will not lie on a justice's judgment until after the
of the time during which execution may issue on such

Towle, 38 Me. 133.
ıey v. Doane, 40 Kan. 681, 20 Pac. 488.
Hamblen, 98 Va. 383, 36 S. E. 491.
Russel, 4 Or. 124. And see Smith v. Belmont & N. Iron Co.,
y.) 390.
. King, 1 Barb. 390.
. Trimble (Ky.) 52 S. W. 940.

judgment, that is, a year and a day.[8] In Louisiana, it is said that the necessity of bringing a separate action to enforce a judgment exists in two cases; first, where it is a foreign judgment, and second, in case of a domestic judgment, where the debtor is dead and his estate is under administration.[9]

In several of the states, it is provided by law that an action on a domestic judgment cannot be prosecuted without leave of the court first obtained, and generally upon a showing of good cause and after notice to the adverse party.[10] Where a statute of this kind is in force, the application for leave to sue on a judgment should be addressed to the court in which the judgment was rendered.[11] But such a statute does not require leave of court to be obtained in order to maintain a suit on a judgment of a federal court sitting in the same state; it is, quoad hoc, a foreign judgment.[12] And conversely, a state statute of this character must be held as intended only to regulate the course of procedure in the courts of that state; and it does not affect the jurisdiction of the federal courts to entertain an action based on a judgment of a court of such state.[13] For similar reasons, where a judgment on a judgment is recovered without such leave to sue being first obtained, this is no obstacle to the maintenance of a suit on the last judgment in a court of another state.[14] Where, as in New York, the statute forbids the

[8] Lee v. Giles, 1 Bailey, 449, 21 Am. Dec. 476; Ligon v. McNeil, 6 Rich. Law, 377; Vandiver v. Hammet, 4 Rich. Law, 509.

[9] Succession of Beckham, 16 La. Ann. 352. So where the debtor has left the jurisdiction. Wood v. Newberry, 48 Mo. 322.

[10] Rev. St. Wis. § 2916; Cole v. Mitchell, 77 Wis. 131, 45 N. W. 948; Code Civ. Proc. N. Y. § 1913; In re Van Beuren, 33 App. Div. 158, 53 N. Y. Supp. 349; Farish v. Austin, 25 Hun (N. Y.) 430; Carpenter v. Butler, 29 Hun (N. Y.) 251; Code Civ. Proc. S. C. § 91; Brock v. Kirkpatrick, 60 S. C. 322, 38 S. E. 779; Code Iowa 1873, § 2521; Watts v. Everett, 47 Iowa, 269; Matthews v. Davis, 61 Iowa, 225, 16 N. W. 102; Wilson v. Tucker, 105 Iowa, 55, 74 N. W. 908; McDonald v. Dickson, 85 N. C. 248; Kendall v. Briley, 86 N. C. 56; Warren v. Warren, 84 N. C. 614; Comp. Laws S. D. § 4831.

[11] Graham v. Scripture, 26 How. Prac. (N. Y.) 501.

[12] Morton v. Palmer, 60 Hun, 583, 14 N. Y. Supp. 912, citing Goodyear Dental Vulcanite Co. v. Frisselle, 22 Hun (N. Y.) 174.

[13] Union Trust Co. v. Rochester & P. R. Co. (C. C.) 29 Fed. 609.

[14] Weber v. Yancy, 7 Wash. 84, 34 Pac. 473.

nance of a suit on a judgment "between the original parties),'' without leave of court, this does not prevent the assignee udgment from suing thereon without obtaining leave.[15] In states, under laws of this kind, it is thought that the granting ve to sue on a judgment is a jurisdictional requisite, which precede the institution of the action, so that, if it is omitted, on for leave to sue nunc pro tunc, made after the action is it, must be denied.[16] But elsewhere, it is held that such leave e granted retrospectively, after suit brought, if the defendant no substantial right thereby, and the order would have been if regularly applied for.[17]

ome jurisdictions, in order to prevent actions on domestic ents being brought vexatiously, the statutes enact that costs ot be allowed in such actions, unless the action was brought revious leave of the court for cause shown.[18] It seems to be ed that an action will not lie on a judgment which appears rd to have been satisfied by levy of execution on real estate, upon the face of it. The record must be held conclusive, y some proceeding brought to operate directly upon the record he levy is avoided.[19] But in some states, the action may be ined, notwithstanding a return made by the officer of a full tion of the execution, when in fact no such satisfaction was d.[20] Causes of action on several judgments cannot be unit- one suit, unless all the debtors in the judgments are the same e made defendants to the action.[21]

app v. Valentine, 24 Civ. Proc. R. 331, 33 N. Y. Supp. 712; McGrath well, 17 App. Div. 246, 45 N. Y. Supp. 587.

ok v. Thurston, 18 Misc. Rep. 506, 42 N. Y. Supp. 1084.

oddard Manuf'g Co. v. Mattice, 10 S. D. 253, 72 N. W. 891.

rchants' Nat. Bank v. Gaslin, 41 Minn. 552, 43 N. W. 483.

att v. Jones, 22 Vt. 341, 54 Am. Dec. 80; Grosvenor v. Chesley, 48). But the rule does not apply if there is a defect of title apparent face of the return; in such case, the creditor may waive the levy. ice v. Pond, 17 Mass. 433. And the levy of an execution on chattels, they are of sufficient value to satisfy the judgment, is not a prima atisfaction of the judgment, and therefore no obstacle to the main- of an action upon it. Smith v. Condon, 174 Mass. 550, 55 N. E. Am. St. Rep. 372.

utchinson v. Inhabitants of Greenbush, 30 Me. 450; Clarkson v. ley, 45 Conn. 1[illegible].

rnes v. Smith, 1 Rob. (N. Y.) 699.

§ 959. Judgment must be Final and in Force.

In order that a judgment should be available as a cause of action, it is plainly necessary that it should be complete and definitive in its nature and a valid and subsisting legal obligation. Hence no action can be maintained upon a merely interlocutory judgment or order.[22] Nor upon a judgment which is void on its face.[23] Nor where it appears from the record of the judgment that its collection has been enjoined, and no disposition of the injunction is shown.[24] But in Kansas an action can be maintained on a dormant domestic judgment, if commenced within one year after the judgment becomes dormant.[25]

§ 960. Effect of Pending Appeal.

According to most of the authorities, the pendency of an appeal, writ of error, or petition for review does not deprive the plaintiff of the right to bring a new action upon his judgment, unless a stay of proceedings has been obtained upon the filing of a sufficient bond.[26] But in Connecticut it is held that an appeal from a judgment of a justice of the peace to the county court, allowed, but not duly entered in that court, not merely suspends the judgment but vacates it, so that an action of debt upon it cannot be sustained.[27] The English cases hold that if the plaintiff sues on his judgment pending a writ of error, and recovers, he cannot take out execution on the new judgment until the revisory proceedings are determined.[28]

[22] Fry v. Malcolm, 4 Taunt. 705; Biddle v. Dowse, 9 Dow. & Ry. 404; Ledyard v. Brown, 39 Tex. 402; MacDougall v. Hoes, 27 Misc. Rep. 590, 58 N. Y. Supp. 209.

[23] Ellis v. Connecticut Mut. Life Ins. Co. (C. C.) 8 Fed. 81; Needham v. Thayer, 147 Mass. 536, 18 N. E. 429; Bruce v. Cloutman, 45 N. H. 37, 84 Am. Dec. 111.

[24] Blair v. Caldwell, 3 Mo. 353.

[25] Baker v. Hummer, 31 Kan. 325, 2 Pac. 808.

[26] Dawson v. Daniel, 2 Flip. 301, Fed. Cas. No. 3,668; Gifford v. Whalon, 8 Cush. (Mass.) 428; Faber v. Hovey, 117 Mass. 107, 19 Am. Rep. 398; Taylor v. Shew, 39 Cal. 536, 2 Am. Rep. 478; Suydam v. Hoyt's Adm'rs, 25 N. J. Law, 230; Woodward v. Carson, 86 Pa. 176; Sublette v. St. Louis, L. M. & S. Ry. Co., 66 Mo. App. 331.

[27] Curtiss v. Beardsley, 15 Conn. 518.

[28] Benwell v. Black, 3 Term. R. 643.

§ 961. Judgments of Inferior Courts.

ıgh a judgment rendered by an inferior court, not of record, e called a debt of record, in the strictest sense, yet it is unde- legal obligation, upon which an action may be maintained ourt of competent jurisdiction.[29] In New York it is held ıction will lie upon a surrogate's decree for the payment of But the courts of Pennsylvania refuse to take cognizance on a decree of the Orphans' Court directing the payment of on the ground that such court has exclusive jurisdiction.[31]

§ 962. Suits on Decrees in Chancery.

ıglish law has always sanctioned the maintenance of actions ›on decrees in chancery rendered in foreign countries or in ıies, when such decrees were merely for the payment of a ım.[32] But in regard to the decrees of their own court of the rule in that country is fixed to the contrary. The law fuse to take cognizance of actions on such decrees, for the ıt the court which made the decree can, within its own juris- nforce it, and therefore the action would be unnecessary.[33] ıited States, some of the earlier cases manifested a disposi- llow the English rule in this respect.[34] But these decisions ı overruled. And it is now well settled that an action of lie in a court of law upon the decree of a domestic court of in all cases where such decree directs the payment of a ıidated, and absolute debt in money.[35] Thus, it is said by

ıns v. Jones, 13 Mees. & W. 628. See Deidrich v. Nachtsheim, 33
Alexander v. Arters, 11 Pa. Co. Ct. R. 211.
v. Dubois, 6 Cow. 494.
s Exr. v. Black, 34 Pa. 354; Fort v. Blagg, 38 Ark. 471.
v. Robins, 1 Camp. 253; Henly v. Soper, 8 Barn. & C. 16; Hender- lerson, 6 Ad. & El. N. S. 295.
ıter v. Thornton, 3 B. & Ald. 52.
v. Higgs, 8 Wheat. 697; Van Buskirk v. Mulock, 18 N. J. Law, 184. v. Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717; Thrall v. Waller, 13 Am. Dec. 592; Williams v. Preston, 3 J. J. Mar. 600, 20 Am. Dec. ıgton v. Gibson, 16 How. 65; Nations v. Johnson, 24 How. 203; y, 12 Cal. 11; Post v. Neafie, 3 Caines, 22; People v. Sturtevant, 9

the supreme court of Pennsylvania: "It is a general principle that where a man is under an obligation to pay a certain sum of money, whether that obligation be founded on a contract or the judgment of a court, an action of debt lies; and on that principle we support actions of debt on foreign judgments, and I confess I see no reason why a decree in chancery is not as strong as a foreign judgment. If it be objected that proceedings in chancery are not according to the course of the common law, the same objection lies against judgments of courts on the continent of Europe, where the proceedings are according to the civil law. To be sure, in the case of a foreign judgment, the defendant is permitted to deny the original cause of action; but so likewise would the defendant in the present case have been permitted to enter into the merits of the original controversy, were it not for the constitution and laws of the United States which forbid it. The objection, therefore, of being precluded from contesting the merits of the original decree does not lie against the action of debt, which, in its nature, did not preclude it, but against the constitution." [36] But an action will not lie on a decree for the performance of any other acts than the payment of money.[37] A decree, in a suit for foreclosure of a mortgage, that the amount found due be paid, or, in default, the premises be sold and the proceeds paid into court, is in the alternative, and in an action on such decree for the whole amount, nul tiel record is a good plea.[38]

§ 963. Parties to Action on Judgment.

According to the practice now prevailing in a majority of the states, the assignee of a judgment is regarded as the "real party in interest," so that he may maintain an action thereon in his own name.[39] But

N. Y. 263; Tilford v. Oakley, Hempst. 197; McKim v. Odom, 12 Me. 94; Mutual Life Ins. Co. v. Newton (N. J.) 14 Atl. 756; Warren v. McCarthy, 25 Ill. 95; Blattner v. Frost, 44 Ill. App. 580; Shainwald v. Lewis, 69 Fed. 487; Moore v. Adie, 18 Ohio, 430; Thrall v. Waller, 13 Vt. 231.

[36] Evans v. Tatem, 9 Serg. & R. 252, 11 Am. Dec. 717.

[37] Warren v. McCarthy, 25 Ill. 95. See Harrison v. Union Trust Co., 144 N. Y. 326, 39 N. E. 353.

[38] Burgess v. Souther, 15 R. I. 202, 2 Atl. 441. But see Rowe v. Blake, 117 Cal. 167, 33 Pac. 864, 37 Am. St. Rep. 45.

[39] Supra, §§ 940, 951. See Love v. Fairfield, 5 Gilman (Ill.) 303; Smith v.

e possession of a transcript of a judgment raises no presump-
ıt the possessor has any interest therein sufficient to enable
sue on it.[40] In debt by an administrator upon a judgment
ɜd by him, he need not declare as administrator; and the rule
ıme where he was appointed administrator by a foreign juris-
and recovered the judgment there. For the judgment is a
e to him, and the principle which forbids a foreign adminis-
ɔ sue for a debt due the estate does not apply.[41] If the judg-
ɜbtor is dead, the rule of the common law forbids the bring-
n action on the judgment against his personal representative.[42]
judgment against an administrator in one state will not sup-
ı action against a different administrator in another state.[43]
a judgment is rendered against two or more defendants
they should all be made parties to an action on the judg-
f living and within the jurisdiction of the court.[44] But when
brought against two defendants who are jointly indebted to
intiff, and one only is served with process, and judgment is
ıgainst him under the provisions of the joint debtor act, and
rds an action is brought upon the judgment so obtained, the
who was not originally served with process is not a proper
efendant to the latter action.[45]

t & N. Iron Co., 11 Bush (Ky.) 390; Triplett v. Scott, 12 Ill. 137; Clark
t, 59 N. J. Law, 308, 35 Atl. 1052; Sammis v. Wightman, 31 Fla. 45,
h. 536; Hall v. Henderson, 126 Ala. 449, 28 South. 531; Chicago & S.
Co. v. Higgins, 150 Ind. 329, 50 N. E. 32; Case Threshing Machine Co.
rson, 6 S. Dak. 140, 60 N. W. 747.

lly v. Reynolds, 1 Ark. 99, 31 Am. Dec. 737.

lmage v. Chapel, 16 Mass. 71. See Winham v. Kline, 72 Mo. App. 615.
ited States v. Cushman, 2 Sumn. 310, Fed. Cas. No. 14,907.

ɜswell v. Slack, 68 Iowa, 110, 26 N. W. 42. But it is otherwise when
ɜssive defendants are executors. Turley v. Dreyfus, 33 La. Ann. 885;
v. Clements, 3 Ga. 426.

ıke v. Burley, 9 Iowa, 592. But see Bignold v. Carr, 24 Wash. 413, 64
9. Where a judgment obtained against a life-tenant and the owners
ɔf land is sought to be enforced out of the land, after the death of the
ant, it is not necessary to make his administrator a party defendant.
ı v. Huber, 34 Ill. App. 527.

ıy v. Hawley, 39 Cal. 93; Lindh v. Crowley, 26 Kan. 47.

§ 964. Requisites of Declaration.

A judgment need not be set out in hæc verba in an action brought upon it; it is sufficient to set it forth according to its legal effect.[46] A complaint in such an action is sufficient if it describes the court in which the alleged judgment was rendered, the place where it was held, the names of the parties, the date at which it was entered, and the amount of the judgment.[47] It is not necessary to allege that the judgment has not been appealed from. It is sufficient to aver that it remains unpaid and in full force.[48] A declaration setting forth the recovery by the plaintiff against the defendant of a judgment for a certain sum as damages and another certain sum as costs, which judgment remains in full force and unsatisfied, whereby an action has accrued to the plaintiff to have and recover of the defendant the balance due thereon and interest, is sufficient on demurrer.[49]

[46] Central Bank of Georgia v. Veasey, 14 Ark. 671. But in Kansas, under a statute providing that, "in an action on a note, bill, or other written instrument as evidence of indebtedness, a copy thereof must be attached to and filed with the pleadings," it is held that a judgment is such an instrument as must be set out by copy. Oberlin Loan, Trust & Banking Co. v. Kitchen, 8 Kan. App. 445, 57 Pac. 494.

[47] Ewing v. Jennings, 15 Nev. 379. See Edwards v. Hellings, 99 Cal. 214, 33 Pac. 799. A petition stating a decree entered in a former proceeding, either as matter of inducement or as the basis of plaintiff's action, need not set out the petition on which such decree was rendered. Davis v. Davis (C. C.) 65 Fed. 380. Where the complaint in an action on a judgment sufficiently describes the judgment, no description of the contract on which the judgment was rendered is necessary. Sims v. Hertzfeld, 95 Ala. 145, 10 South. 227.

[48] Chaquette v. Ortet, 60 Cal. 594; Carter v. Paige, 80 Cal. 390, 22 Pac. 188; Bronzan v. Drobaz, 93 Cal. 647, 29 Pac. 254. A declaration in debt on a judgment, stating that the judgment remains in full force, and unsatisfied in part, to wit, for a certain sum, sufficiently alleges that the judgment is unsatisfied. Bellows v. Sowles, 71 Vt. 214, 44 Atl. 68. An averment that the judgment sued on is due and wholly unpaid is sufficient to show that the judgment is in full force. City of Hammond v. Evans, 23 Ind. App. 501, 55 N. E. 784. And an allegation that the judgment remains valid and in full force is equivalent to an allegation that it is unpaid. Wise v. Loring, 54 Mo. App. 258.

[49] O'Neal v. Kittredge, 3 Allen (Mass.) 470.

§ 965. Declaring on Judgment of Inferior Court.

here suit is brought on the judgment of an inferior court, or of limited or statutory jurisdiction, it is no longer considered sary (as formerly it was) to allege all the proceedings in full. after setting out the jurisdictional facts, a general averment of erinde taliter processum fuit" is admissible as a summary of all steps up to the recovery.[50]

§ 966. Averments of Jurisdiction.

regard to allegations of jurisdictional facts, in a declaration a domestic judgment, an important distinction is to be noted een the judgments of courts of record and those of the inferior nals. In suing on a judgment rendered by a superior court of ral jurisdiction, it is not necessary to set out the facts conferring diction; for in such cases the presumption is in favor of juris- on and all things requisite to the validity of the judgment.[51] But ing on the judgment of an inferior or limited court, it is neces- as a general rule, unless the requirement is specially abrogated tatute, to set out in detail all the facts conferring jurisdiction of the subject-matter and the person of the defendant.[52] And, pendently of statutes, a general allegation that the court had

Makareth v. Pollard, 1 Ld. Raym. 80; Rowland v. Veale, 1 Cowp. 18; inson v. Martin, 2 Mod. 195; Cornell v. Barnes, 7 Hill (N. Y.) 37, note; es v. Harris, 4 N. Y. 375.

Wilbur v. Abbot, 58 N. H. 272; Hansford v. Van Auken, 79 Ind. 302; lding v. Baldwin, 31 Ind. 376; Bruckman v. Taussig, 7 Colo. 561, 5 Pac. Holmes v. Campbell, 12 Minn. 221 (Gil. 141); City of Hammond v. Evans, d. App. 501, 55 N. E. 784; McCoy v. Van Ness, 98 Cal. 675, 33 Pac. 761; er v. Dickinson, 93 Cal. 108, 28 Pac. 854; Burnes v. Simpson, 9 Kan. 658; c v. Paymaster Min. Co., 95 Cal. 524, 30 Pac. 765, 29 Am. St. Rep. 149; ngsteene v. Gillett, 30 Hun (N. Y.) 260; Rogers v. Odell, 39 N. H. 452; e of Probate v. Fillmore, 1 D. Chip. (Vt.) 423; Pennington v. Gibson, 16 . 65, 14 L. Ed. 847; Lathrop v. Stuart, 5 McLean, 167, Fed. Cas. No. 3.

Willey v. Strickland, 8 Ind. 453; Dakin v. Hudson, 6 Cow. (N. Y.) 221: eland v. Rogers, 6 Wend. (N. Y.) 438; Cornell v. Barnes, 7 Hill (N. Y.) Barnes v. Harris, 3 Barb. (N. Y.) 603; Turner v. Roby, 3 N. Y. 193; ge v. Ford, 4 Mass. 641; Payne v. Taylor, 34 Ill. App. 491; Willits v. ter, 32 Or. 411, 52 Pac. 24.

jurisdiction is not sufficient, but the facts must be detailed.[53] But as regards jurisdiction of the subject-matter, the trial court will take judicial notice of statutes conferring jurisdiction on these tribunals, and if the facts pleaded as to the amount and nature of the claim show that it was within the provisions of such statutes, jurisdiction of the subject-matter is sufficiently averred.[54]

§ 967. Statutes Regulating Jurisdictional Averments.

In most of the states statutes have been enacted prescribing that in suing on a judgment of a court of limited or inferior jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but merely that the judgment or determination was duly given or made; but that, if that allegation is controverted, the party pleading the judgment must, on trial, establish the facts conferring jurisdiction.[55] Under these statutes, the allegation that the judgment was "duly given" or made is equivalent to, and a substitute for, the averments of jurisdictional facts required at common law.[56] Thus an allegation that a judgment was "duly made by and entered in" a certain court is sufficient.[57] But either the words of the statute or words of exactly

[53] Cleveland v. Rogers, 6 Wend. (N. Y.) 438; Sheldon v. Hopkins, 7 Wend. (N. Y.) 435; Barnes v. Harris, 3 Barb. (N. Y.) 603.

[54] Masterson v. Matthews, 60 Ala. 260; Stiles v. Stewart, 12 Wend. (N. Y.) 473, 27 Am. Dec. 142.

[55] Code Civ. Proc. N. Y. § 532; Sand. & H. Dig. Ark. (1884) c. 119, § 5057; Comp. Laws Ariz. (1877) § 2495; Code Civ. Proc. Cal. § 456; Code Civ. Proc. Dak. § 130; 2 Miller's Rev. Code Iowa, § 2714; Code Civ. Proc. Colo. § 66; Rev. St. Idaho (1887) § 4211; Burns' Rev. St. Ind. 1894, § 372; Code Civ. Proc. Kan. § 121; Carroll's Civ. Code Ky. § 122; 2 How. Ann. Mich. § 6878; Gen. St. Minn. (1878) p. 722, § 108; 2 Wagner's St. Mo. (1870) p. 1020, § 42; Code Civ. Proc. Mont. § 103; Rev. St. Wis. § 2673; Gen. St. Neb. (1885) p. 645, § 127; 1 Comp. Laws Nev. p. 298, c. 52, § 59; Tourgee's Code N. C. p. 109, § 121; 1 Rev. St. Ohio (1890) § 5090; 1 Hill's Laws Or. p. 230, § 86; Rev. St. S. C. (1872) p. 609, § 184; 2 Comp. Laws Utah (1888) p. 250, § 3242.

[56] Keys v. Grannis, 3 Nev. 548; Willey v. Strickland, 8 Ind. 453; Crake v. Crake, 18 Ind. 156; Chicago & S. E. Ry. Co. v. Higgins, 150 Ind. 329, 50 N. E. 32; Garner v. Wills, 92 Ky. 386, 17 S. W. 1023; Hanscom v. Tower, 17 Cal. 518; Weller v. Dickinson, 93 Cal. 108, 28 Pac. 854; Bronzan v. Drobaz, 93 Cal. 647, 29 Pac. 254; Wheeler v. Dakin, 12 How. Prac. (N. Y.) 537; State v. Bowen, 45 Miss. 347. These statutes apply only to the judgments of inferior courts, and do not affect the rule that the jurisdiction of the superior courts is presumed. Ashton v. Heydenfeldt, 124 Cal. 14, 56 Pac. 624.

[57] Lee v. Terbell (C. C.) 33 Fed. 850.

r import must be employed. Hence an allegation that the ıent was "entered in said action," without averring that it was ntered, is not considered sufficient.[58] In some jurisdictions, it l that the provisions of these statutes apply to judgments ren- by the inferior courts of a sister state.[59] But it is apparently l that they do not include judgments of such courts in foreign ries.[60]

§ 968. Evidence.

an action on a judgment of a court of a sister state, the judg- itself is to be proved by a copy of the record duly authenticated the act of congress in that behalf.[61] If the judgment was red by a co-ordinate court of the same state, it should be evi- d by an exemplification attested in accordance with the local If it was rendered by the same court in which the action is ght, the original record or judgment-roll should be produced.[62] minute book of the court is not evidence of a judgment.[63] And , in such an action, the judgment is sought to be proved by a cript, the transcript must correspond to the declaration, or it ot be read in evidence.[64] Thus, under the plea of nul tiel record,

Iunt v. Dutcher, 13 How. Prac. (N. Y.) 538. An allegation that, in an before a justice of the peace, plaintiff "recovered a judgment" against iant, is insufficient. Weaver v. English, 11 Mont. 84, 27 Pac. 396. So, not sufficient to allege that the judgment was recovered and duly en- and docketed, since this may all be true, though the judgment was not recovered. People v. Bacon, 37 App. Div. 414, 55 N. Y. Supp. 1045. But ne other states, it is thought that the statute is substantially complied by alleging that the plaintiff "recovered a judgment" and that "such ıent was duly docketed." Pierstoff v. Jorges, 86 Wis. 128, 56 N. W. 735, n. St. Rep. 881. And see Scanlan v. Murphy, 51 Minn. 536, 53 N. W.

Crake v. Crake, 18 Ind. 156; Toledo, W. & W. Ry. Co. v. McNulty, 34 31. But see Karns v. Kunkle, 2 Minn. 313 (Gil. 268).

McLaughlin v. Nichols, 13 Abb. Prac. (N. Y.) 244; Hollister v. Hollister, ow. Prac. (N. Y.) 539.

Supra, §§ 876–879, 937.

Wentworth v. Kenzer, 30 Me. 336; Smith v. Frost, 5 Hill (N. Y.) 431; v. Crosby, 173 Mass. 433, 53 N. E. 880. See Peterson v. Gittings, 107 306, 77 N. W. 1056.

Lehr v. Hall, 5 How. (Miss.) 54.

Lawrence v. Willoughby, 1 Minn. 87 (Gil. 65). Where, in suing on a nent, plaintiff alleges that it is a corporation, and that it was plaintiff

a variance as to the amount, between the judgment laid and the judgment produced, is fatal.[65] But where a declaration on a judgment rendered in the United States circuit court for the district of Mississippi described it as rendered in a suit brought in that court, and it appeared that the suit originated in the district court for the same district, it was held that the variance was not fatal.[66]

§ 969. Action on Lost or Destroyed Record.

Some few of the authorities hold that no action can be maintained upon a record which has been lost or destroyed; that the existence and tenor of a judgment can be proved in no other way than by an inspection of the record itself; and that therefore, if a party desires to sue upon a judgment the record of which, for such reasons, cannot be produced, he must first resort to the court which made the record and procure its restoration by proper proceedings for that purpose.[67] But the great preponderance of authority is in favor of the rule that, in such a case, secondary evidence is admissible to establish the fact of the existence of such a judgment and its contents.[68]

in the judgment, it is not necessary that the truth of these allegations should appear on the face of the certified copy of the judgment offered in evidence. Missouri Glass Co. v. Gregg (Tex. App.) 16 S. W. 174.

[65] Eichelberger v. Smyser, 8 Watts (Pa.) 181; Butler v. Owen, 7 Ark. 369. In an action on a judgment reciting that it is payable in gold, but based on a contract silent as to the medium of payment, a declaration omitting the clause in regard to payment in gold does not render the judgment record inadmissible on the ground of variance, since such clause may be rejected as surplusage. Belford v. Woodward, 158 Ill. 122, 41 N. E. 1097, 29 L. R. A. 593. So where the declaration was on a general judgment, and the judgment introduced was made payable out of certain public funds, the limitation in the manner of payment was surplusage, and there was no variance. City of East St. Louis v. Canty, 65 Ill. App. 325.

[66] Dudley v. Lindsey, 9 B. Mon. (Ky.) 486, 1 Am. Rep. 522.

[67] Foulk v. Colburn, 48 Mo. 230; Walton v. McKesson, 64 N. C. 77.

[68] Mandeville v. Reynolds, 68 N. Y. 528; Jackson v. Crawfords, 12 Wend. (N. Y.) 533; Jackson v. Cullum, 2 Blackf. (Ind.) 228, 18 Am. Dec. 158; Inhabitants of Stockbridge v. Inhabitants of West Stockbridge, 12 Mass. 400; Newcomb v. Drummond, 4 Leigh (Va.) 57; Mason v. Bull, 26 Ark. 164; Ames v. Hoy, 12 Cal. 11; Parry v. Walser, 57 Mo. 169.

§ 970. Defenses to Action on Judgment.

e general rule is, that in an action upon a judgment, no defense missible which accrued prior to the rendition of the judgment. all such defenses either were in fact litigated in the original n, or might have been then interposed by the exercise of proper ence, and therefore in either case they are res judicatæ.[69] Thus, defendant cannot plead that he was an infant at the time the ment was rendered; for if he did plead that defense in the orig- action, it is res judicata, and if he did not, it is a defense which ught to have made, and which he cannot be allowed to set up n action on the judgment.[70] On no pretext can the merits of judgment be re-examined. And consequently the plea of nil t cannot be permitted.[71] Thus, the validity of the judgment not be impeached by showing that the note on which it was ded was given for a loan of "Confederate" treasury notes.[72] for the same reason, evidence that before the judgment was lered the claim on which it was founded was in part satisfied, competent, while the judgment remains unreversed.[73] But a gment does not conclude a defense which did not exist at the

Biddle v. Wilkins, 1 Pet. 692, 7 L. Ed. 315; Wittemore v. Malcomson (C. 28 Fed. 605; Noble v. Merrill, 48 Me. 140; Bird v. Smith, 34 Me. 63, m. Dec. 635; Jones v. Jones, 87 Me. 117, 32 Atl. 779; Flint v. Sheldon, lass. 443, 7 Am. Dec. 162; McAllister v. Singer Manuf'g Co., 64 Ga. Sims v. Hertzfeld, 95 Ala. 145, 10 South. 227; Bullock v. Ballew, 9 Tex. Taylor v. Harris, 21 Tex. 438; Snow v. Mitchell, 37 Kan. 636, 15 Pac. Morris v. Curry, 41 Ark. 75; Ellis v. Clarke, 19 Ark. 420, 70 Am. 603; Brown v. Trulock, 4 Blackf. (Ind.) 429; Burton v. Stewart, 11 238; Indianapolis, B. & W. Ry. Co. v. Risley, 50 Ind. 60; Guinard v. singer, 15 Ill. 288; Shadbolt v. Findeisen, 88 Ill. App. 432; Jackson v. cher, Morris (Iowa) 230; Poorman v. Mitchell, 48 Mo. 45; Morris v. mer, 16 Wis. 547.

Ludwick v. Fair, 29 N. C. 422, 47 Am. Dec. 333.

Tappan v. Heath, 16 N. H. 34.

Allgood v. Whitley, 49 Ala. 215.

Stephens v. Howe, 127 Mass. 164; Bird v. Smith, 34 Me. 63, 56 Am. Dec. So, in an action on a judgment, it is no defense that the original m was barred by the statute of limitations. Carey v. Roosevelt (C. C.) Fed. 242. But if the action on a judgment is between the original par- thereto, the defendant may plead a counterclaim growing out of a tract between them, even though it might have been set up in the

time of its rendition, and such defense, becoming available in the interval, may be set up against an action on the judgment.[74]

§ 971. Plea of Nul Tiel Record.

The proper form of the general issue in an action upon a domestic judgment is nul tiel record.[75] This plea puts in issue simply the existence of the record declared upon, and is determined by the court upon an inspection of the record. If the judgment upon its face is valid, the plea is not sustained except when questions of variance arise. The record should go to the jury only when matter of fact, as well as of law, is properly put in issue.[76] Under this plea the validity of the declaration is not involved; the only inquiry is whether or not the judgment sued on was correctly set forth and described by the plaintiff.[77] Where the plaintiff in his declaration makes profert of the judgment declared on, it does not thereby become a part of the record, so as to enable the defendant to demur for defects in the judgment.[78]

original action. Rose v. Northwest Fire & Marine Ins. Co. (C. C.) 67 Fed. 439; Brower v. Nellis, 6 Ind. App. App. 323, 33 N. E. 672.

[74] Burwell v. Jackson, 9 N. Y. 535.

[75] Westerwelt v. Lewis, 2 McLean, 511, Fed. Cas. No. 17,446; Crawford v. Simonton's Ex'rs, 7 Port. (Ala.) 110; Wilbur v. Abbott, 59 N. H. 132; Reynolds v. Robertson (Cal.) 4 Pac. 1192. Under the code system of pleading, a general denial is equivalent to pleading the general issue of nul tiel record. First Nat. Bank v. Hamor (C. C.) 47 Fed. 36.

[76] Stevens v. Fisher, 30 Vt. 200; Clemons v. Clemons' Estate, 69 Vt. 545, 38 Atl. 314; City of East St. Louis v. Canty, 65 Ill. App. 325. In an action of debt on a judgment, where the defendant pleads nul tiel record, the only question to be determined is whether such a judgment exists as is alleged, and if there is a material variance, it will be fatal. Lancaster v. Inhabitants of Richmond, 83 Me. 534, 22 Atl. 393. The plea of nul tiel record does not raise the issue whether the judgment in suit has been transferred to the plaintiff. Marx v. Logue, 71 Miss. 905, 15 South. 890. Where the declaration is on a judgment rendered by a domestic court of record, the plea of nul tiel record should conclude with a verification to the court only, not to the country; but otherwise, if the judgment was rendered by a foreign court, or by an inferior court, not a court of record. Thornton v. Lane, 11 Ga. 459; Steele v. Hanna, 8 Blackf. (Ind.) 326; Wittemore v. Malcomson, 9 N. J. Law J. 338.

[77] Dudley v. Lindsey, 9 B. Mon. (Ky.) 486, 1 Am. Rep. 522.

[78] Deem v. Crume, 46 Ill. 69.

§ 972. Want of Jurisdiction as a Defense.

:cording to the doctrine prevailing in some of the states, in an ›n on a domestic judgment which is sought to be made the ; of a new recovery, it is permissible to show that the court ering the judgment had no jurisdiction, either of the person or subject-matter, and this even in contradiction of the direct and tive recitals of the record; the rule being based on the theory such a proceeding is a direct attack upon the judgment, and a collateral impeachment of it.[79] But in other states it is not nitted to defend against the judgment on this ground, the doc- : which ascribes "absolute verity" to the record being considered ›f controlling authority.[80] The reader will find a detailed dis- ion of the subject of impeaching judgments for want of juris- on in an earlier chapter of this work.[81] It need scarcely be :d that if the judgment sued on be a foreign judgment, or one lered in a sister state, the question of jurisdiction is always open nquiry.[82]

§ 973. Fraud as a Defense.

.s a general rule, in an action at law upon a judgment of a court ;eneral jurisdiction, the defendant is not permitted to show, as a ter of defense at law, that the judgment was fraudulently ob-

Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Clark v. Little, Iowa, 497; Salladay v. Bainhill, 29 Iowa, 555; Indianapolis & St. L. Co. v. Harmless, 124 Ind. 25, 24 N. E. 369; Evans v. Instine, 6 Ohio, Greene v. Woodland Ave. & W. S. St. R. Co., 62 Ohio St. 67, 56 N. E. Hill v. City Cab & Transfer Co., 79 Cal. 188, 21 Pac. 728; Baldwin Kimmel, 16 Abb. Prac. (N. Y.) 353; Vaule v. Miller, 69 Minn. 440, 72 W. 452; Deering v. Poston, 78 Minn. 29, 80 N. W. 783; Minter v. Green I. T.) 49 S. W. 48. An answer which alleges want of jurisdiction to ler the judgment sued on is not defective because it fails to state a ense to the cause of action on which the judgment was founded. Kings- ›ugh v. Tousley, 56 Ohio St. 450, 47 N. E. 541; Minter v. Green (Ind. T.) S. W. 48.

› Miller v. Dungan, 35 N. J. Law, 391; Kittredge v. Martin, 141 Mass. , 6 N. E. 95; Maysville & B. S. R. Co. v. Ball (Ky.) 56 S. W. 188; Holt v. ıcher, 52 Vt. 592.

1 Supra, vol. 1, §§ 270–289.

2 Supra, §§ 818, 835, 894–915.

tained.[83] But in those states where the code system of pleading and practice has abolished all distinction between actions at law and suits in equity, any kind of equitable defense may be set up to an action at law. Now equity can afford relief against a judgment obtained at law by fraud. Therefore, in those states, fraud can be pleaded to an action at law on the judgment.[84] But that a judgment was obtained by the false testimony of the plaintiff, or other witnesses, on the trial of the cause in which it was rendered, the defendant being in court, cannot be set up as a defense to an action thereon.[85]

§ 974. Error or Irregularity no Defense.

Although a judgment may be so erroneous or irregular that it would be vacated on motion or reversed on appeal, yet it is not open to collateral impeachment on this ground. Until it is corrected or annulled in a regular and proper manner, it is a valid and binding obligation. The defendant must seek his remedy by appeal or error, or by a motion to set the judgment aside. If an action is brought upon the judgment, he cannot plead the error or irregularity in defense.[86] This was the principle of the decision in an English case where, to an action against husband and wife, on a judgment against the wife, the defendants pleaded that she was covert when the action in which the judgment was recovered was commenced and thence until the judgment, and that the husband was not a party to the judgment or a defendant in the action; but it was held that the plea was bad.[87]

[83] Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475; Carpentier v. City of Oakland, 30 Cal. 439.

[84] Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; State of Michigan v. Phœnix Bank, 33 N. Y. 9, 27; Hackley v. Draper, 60 N. Y. 88; Greene v. Hallenbeck, 24 Hun (N. Y.) 116; Gardiner v. Van Alstyne, 103 N. Y. 573, 57 N. E. 1110; Stone v. Lewman, 28 Ind. 97; Miller v. Lovell (Tex. Civ. App.) 40 S. W. 835; Peel v. January, 35 Ark. 331, 37 Am. Rep. 27; Duringer v. Moschino, 93 Ind. 495; Hopkins v. Woodward, 75 Ill. 62.

[85] Cottle v. Cole, 20 Iowa, 481; Demerit v. Lyford, 27 N. H. 541.

[86] Hawes v. Hathaway, 14 Mass. 233; Townsend v. Cox, 45 Mo. 401; Hammond v. Place, 116 Mich. 628, 74 N. W. 1002, 72 Am. St. Rep. 543; supra, vol. 1, §§ 261-269.

[87] Dick v. Tolhausen, 4 Hurl. & N. 695.

§ 975. Plea of Payment.

o an action on a record, a plea of payment was not good at ıon law. But if a judgment of record had been paid, the de- nt had a right to demand a warrant to some attorney of the , authorizing him to enter up satisfaction on the roll. But by tatute of 4 Anne, c. 16, § 12, payment may be pleaded to an ı on a judgment, if the whole judgment be satisfied."[88] And can be no question that such plea would now be good in all ourts of this country.[89] It is said, however, that in debt on a nent, under the plea of payment, the defendant cannot properly lowed the benefit of a partial payment, because the plea is ;rly one in bar and goes to the entire amount of the judgment, he proper mode of obtaining the benefit of such partial pay- is by rule to show cause why it should not be applied on the nent. Still, if evidence of a partial payment is given without tion, under such plea, and the jury allows it, the appellate court ıot set aside the verdict and order a new trial for that reason.[90] t is clearly not admissible for the defendant to prove that a ɔf the claim on which the judgment is founded was paid before ;ndition of the judgment.[91] It is no defense to an action on a nent that an execution upon it is in full life and in the officer's ;, if there is no plea or proof of payment.[92] The payment or action of the judgment must be specially pleaded; it cannot oved under the plea of nul tiel record.[93] And according to the

riley v. Sugg, 21 N. C. 366, 30 Am. Dec. 172, citing 1 Archb. Prac. 325; nd. Prac. Cas. 713; 1 Chit. Pl. 426.

;e Conner v. Pennington, 1 Del. Ch. 177; Thom v. Wilson's Ex'r, 27 70; Gulick v. Loder, 13 N. J. Law, 68, 23 Am. Dec. 711; Wolcott v. ı, 53 Ind. 70; Maddox v. Summerlin, 92 Tex. 483, 49 S. W. 1033.

olclough v. Rhodus, 2 Rich. Law (S. C.) 76.

ird v. Smith, 34 Me. 63, 56 Am. Dec. 635.

'hite River Bank v. Downer, 29 Vt. 332; Tarbell v. Same, Id. 339; lds v. Lyon, 20 Ga. 225; Linton v. Hurley, 114 Mass. 76; Wilson v. ld, 121 Mass. 551. Per contra, Ligon v. McNeil, 6 Rich. Law (S. C.) And see Gassner v. Sandford, 2 Sandf. (N. Y.) 440.

unstall v. Robinson, Hemp. 229, Fed. Cas. No. 14,238a.

strict theory, the defendant may plead either nul tiel record or payment of the judgment but not both.[94]

§ 976. Accord and Satisfaction as a Defense.

It is generally held that the plea of accord and satisfaction is a good defense to an action on a judgment.[95] But there is also authority for the rule that debt on a judgment cannot be barred at common law, by an accord and satisfaction by parol.[96]

§ 977. Discharge in Bankruptcy.

The generally accepted rule is that where a judgment is actually rendered before the discharge of the defendant under the bankrupt act, for the payment of a debt which was contracted before the proceedings in bankruptcy were instituted, such debt may be proved under the decree in bankruptcy; and the discharge of the defendant is a bar to any suit or other proceeding upon the judgment to charge the defendant personally with the debt, unless the discharge can be successfully impeached for some of the causes specified in the bankrupt law.[97] But in some jurisdictions the opinion prevails that if

[94] Riley v. Riley, 20 N. J. Law, 114. But in New Hampshire, under the practice as to double pleading, the defendant in an action of debt on a judgment may plead both nul tiel record and payment, and also a release. Chapman v. Sloan, 2 N. H. 464. And see Crawford's Ex'rs v. Ellison, 1 Brev. (S. C.) 378.

[95] Farmers' Bank v. Groves, 12 How. 51, 13 L. Ed. 889; Savage v. Everman, 70 Pa. 315, 10 Am. Rep. 676; Witherby v. Mann, 11 Johns. (N. Y.) 518; Boyd v. Hitchcock, 20 Johns. (N. Y.) 76, 11 Am. Dec. 247; Le Page v. McCrea, 1 Wend. (N. Y.) 164, 19 Am. Dec. 469; Brown v. Feeter, 7 Wend. (N. Y.) 301; Evans v. Wells, 22 Wend. (N. Y.) 324; La Farge v. Herter, 11 Barb. (N. Y.) 159; Bellows v. Sowles, 71 Vt. 214, 44 Atl. 68; Harden v. Campbell, 4 Gill (Md.) 29; McCullough v. Franklin Coal Co., 21 Md. 256; Reid v. Hibbard, 6 Wis. 175; Jones v. Ransom, 3 Ind. 327.

[96] Mitchell v. Hawley, 4 Denio (N. Y.) 414, 47 Am. Dec. 260.

[97] Johnson v. Fitzhugh, 3 Barb. Ch. (N. Y.) 360; Clark v. Rowling, 3 N. Y. 216, 53 Am. Dec. 290; Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985; In re McBryde (D. C.) 99 Fed. 686; In re Pinkel, 1 Nat. Bankr. N. 161; In re Brown, 5 Ben. 1, Fed. Cas. No. 1,975; In re Crawford, 3 N. B. R. 698, Fed. Cas. No. 3,363; In re Stansfield, 4 Sawy. 334, Fed. Cas. No. 13,294; In re Vickery, 3 N. B. R. 696, Fed. Cas. No. 16,930; Bankr. Act 1898, § 63a, cl. 5.

udgment was obtained after the defendant was adjudicated a rupt and before his discharge, upon a debt provable under the rupt law, the debt is merged in the judgment, and the subse- : certificate of discharge is no defense to an action on the judg- .[98]

§ 978. Arrest and Imprisonment of Debtor.

, an action of debt on a judgment it is a good plea in bar that ution issued on the judgment declared on, and by virtue thereof idant was arrested and committed to prison, without averring the defendant remained in prison until the commencement of present action. Any facts which show that the debtor has been iarged from imprisonment without satisfaction of the judgment ld be replied by the plaintiff.[99] But such action is not barred he fact that the bail of the defendant in the former suit had sur- ered him, and that he was in prison by virtue of such surrender, liable to be taken upon execution, when the plaintiff commenced second action and arrested the defendant's body.[100]

§ 979. Equitable Defenses.

1 several of the states, statutes have been enacted which provide , in actions at law, the defendant shall be entitled to allege as a ense any facts which would entitle him in equity to be absolutely eved against the plaintiff's claim or cause of action, or against a gment obtained by the plaintiff in such action. And in others, the abolition of the distinction between law and equity, precisely same result has been brought about, the courts hearing any enses available to the defendant, whether legal or equitable in ir character. In construing a statute of the former class, the reme court of Massachusetts recently expressed itself as follows: he purpose of the statute was not to create any new equitable enses in addition to those already existing, but to permit a de-

[98] Bown v. Morange, 108 Pa. 69; Woodbury v. Perkins, 5 Cush. (Mass.) 51 Am. Dec. 51.

[99] Kinsman v. Page, 22 Vt. 628; Coburn v. Palmer, 10 Cush. (Mass.) 3.

[100] Clark v. Goodwin, 14 Mass. 237.

fendant in an action at law to avail himself of those which were recognized by courts of equity, and thus relieve him from the necessity of initiating a new procedure in order to obtain the benefit of them. That a defense should be established under it, such defense must be one within the rules and principles of equity jurisprudence. A court of equity will interfere undoubtedly to restrain a party from executing a judgment, when facts appear showing that it would be against conscience that he should do so, of which facts the injured party could not have availed himself in a court of law, or of which he might have availed himself, but which he had been prevented from doing by fraud or accident unmixed with any fraud or negligence in himself or his agents." And it was accordingly held that the statute did not permit the defendant to set up a defense against an action on the judgment which he might have presented in the original action, upon the mere allegation that he was ignorant of it at the time, where no excuse was offered for not ascertaining and setting up such defense at the proper time, and no deception or fraud on the part of the plaintiff was alleged.[101] In the federal courts, equitable defenses cannot be set up in actions at law.[102] Hence, in an action on a domestic judgment in a federal court, a paragraph of the answer seeking to impeach the judgment sued on for fraud, should be stricken out.[103]

§ 980. Amount of Recovery.

In an action upon a judgment rendered in another state, for the penalty of a bond, to stand as a security for future as well as past breaches, the plaintiff can recover only the amount of damages for past breaches for which execution has been there awarded, and not the amount of the penalty.[104] "Judgments by default are interlocutory or final, and although in actions of debt the judgment by default is commonly said to be final, still where the action is brought on a judgment, the plaintiff is entitled to a writ of inquiry, after a

[101] Barton v. Radcliffe, 149 Mass. 275, 21 N. E. 374.

[102] Bennett v. Butterworth, 11 How. 669, 13 L. Ed. 859; Montejo v. Owen, 14 Blatchf. 324, Fed. Cas. No. 9,722; Parsons v. Denis (C. C.) 7 Fed. 317.

[103] Buller v. Sidell (C. C.) 43 Fed. 116.

[104] Battey v. Holbrook, 11 Gray (Mass.) 212.

judgment by default, to recover interest by way of damages for the detention of the debt." [105]

§ 981. Interest on Judgments.

At common law, judgments did not bear interest, and in an action on a judgment interest was recoverable (if at all) only by way of damages.[106] In Louisiana, under the statute, interest cannot be collected on a money judgment which, by its terms, is silent as to interest.[107] But in a majority of the states, by the present statutes. interest is allowed on judgments and may be recovered in actions upon them.[108] Thus in Pennsylvania it is held (and indeed it has been the law of that state from a very early day) that whether debt or scire facias is brought on a judgment, interest is recoverable.[109] In regard to the various classes of judgments which carry interest, and to any exceptions or qualifications of the general rule, information must be sought in the local statute law.[110] The subject of

[105] Smith's Adm'rs v. Vanderhorst, 1 McCord (S. C.) 328, 10 Am. Dec. 678. In an action on a judgment. it is proper for the plaintiff to recover the costs shown by the original judgment as a part thereof. Cranor v. School Dist., 81 Mo. App. 152.

[106] Collais v. McLeod, 30 N. C. 221, 49 Am. Dec. 376; Thompson v. Monrow, 2 Cal. 99, 56 Am. Dec. 318; Hamer v. Kirkwood, 25 Miss. 95; Trenholm v. Bumpfield, 3 Rich. Law (S. C.) 376; Crawford v. Simonton's Heirs, 7 Port. (Ala.) 110; Thomas v. Wilson, 3 McCord (S. C.) 166; Manning v. Norwood's Adm'rs, 2 Nott. & McC. (S. C.) 395; Harrington v. Glenn, 1 Hill (S. C.) 79.

[107] Succession of Anderson, 33 La. Ann. 581. And see Keenan v. Whitehead, 15 La. Ann. 333.

[108] See Attorney General v. Western Union Tel. Co., 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628; Cruger v. Sullivan, 11 Tex. Civ. App. 377, 32 S. W. 448; Lombard Inv. Co. v. Burton, 5 Kan. App. 197, 47 Pac. 154; San Joaquin Land & Water Co. v. West, 99 Cal. 345, 33 Pac. 928. Rev. St. U. S. § 966, allows interest on judgments recovered in the federal courts when such interest is allowed by the laws of the state in which the court is held. See Washington & G. R. Co. v. Tobriner, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284; Moran v. Hagerman (C. C.) 69 Fed. 427.

[109] Berryhill v. Wells, 5 Bin. (Pa.) 56; Schell v. Stetson, 12 Phila. (Pa.) 187.

[110] A statute allowing interest generally on "judgments" applies to judgments in actions for tort. Woodbury v. District of Columbia, 19 D. C. 157. A judgment for damages rendered as compensation for land taken under the power of eminent domain is entitled to draw interest, unless excepted from the statute. Epling v. Dickson, 170 Ill. 329, 48 N. E. 1001. Where compensa-

allowing interest on judgments recovered in other states, and the rate at which it is to be computed, has already been discussed.[111] There are, however, a few general rules, which bear upon this part of our subject, which may be here noticed. Thus, it has been held that a recovery of damages for simple negligence of a party to whom no benefit could accrue by reason of the injury inflicted, should not carry interest.[112] In Texas, and probably some other states, an account against an estate, after being allowed by the administrator and approved by the probate court, bears interest.[113] And where a judgment has been recovered for the full penalty of a bond, such judgment will carry interest.[114] But it is otherwise in the case of a judgment rendered for a fine.[115] In an action of debt on a judgment, where partial payments have been made, interest is to be computed upon the judgment in the same manner as upon a note of hand under similar circumstances.[116] As to the date at which the interest to be computed on a judgment begins to run, it is the general rule that the interest commences from the time the judgment is perfected.[117] And a judgment cannot be rendered to

tion was allowed to an assignee by decree of court for services rendered before the assignment was set aside, to be paid from the property, which was transferred to a receiver, the assignee is entitled to interest thereon from the date of the decree. Mann v. Poole, 48 S. C. 154, 26 S. E. 229. Where a judgment is properly allowed to be set off against another, the decree should include interest thereon at the legal rate from the date of the judgment. National S. S. Co. v. Tugman, 27 C. C. A. 116, 82 Fed. 246.

111 Supra, § 880.

112 Kenney v. Hannibal & St. J. R. Co., 63 Mo. 99; Western & A. R. Co. v. Young, 81 Ga. 397, 7 S. E. 912, 12 Am. St. Rep. 320. And see State v. Harrington, 44 Mo. App. 297.

113 Finley v. Carothers, 9 Tex. 517, 60 Am. Dec. 179.

114 Winslow v. Aucrum's Assignees, 1 McCord, Eq. (S. C.) 100; Furber v. McCarthy, 59 Hun (N. Y.) 622, 12 N. Y. Supp. 794.

115 State v. Steen, 14 Tex. 396; People v. Sutter St. Ry. Co., 129 Cal. 545, 62 Pac. 104, 79 Am. St. Rep. 137. But a judgment for costs will bear interest. Linck v. City of Litchfield, 31 Ill. App. 104.

116 Hodgdon v. Hodgdon, 2 N. H. 169.

117 Johnson v. Tuttle, 17 Abb. Prac. (N. Y.) 315. But when an action is brought upon an interest-bearing claim, and there is a verdict for the plaintiff, and the defendant delays the giving of judgment by a motion for a new trial or otherwise, the plaintiff is entitled to legal interest on the verdict. Dowell v. Griswold, 5 Sawy. 39, Fed. Cas. No. 4,041; Gibson v. Cincinnati Enquirer, 2 Flip. 88, Fed. Cas. No. 5,391.

draw interest from a day prior to its rendition.[118] If there is interest due on the demand on which the action is brought, it should be included in the original judgment when entered.[119] But a recent case in Wisconsin holds that when judgment is taken by default, interest will be allowed on the amount of the judgment from the time of the commencement of the action, although the complaint is for unliquidated damages and interest is not specifically prayed for.[120]

§ 982. Rate of Interest how Determined.

In the absence of a statute changing the rule, a judgment carries only such rate of interest as was established by law at the date of its rendition, notwithstanding the contract or cause of action on which it was founded may bear a higher rate; because the contract is merged in the judgment, and thereafter the law fixes the interest and not the parties.[121] But in several of the states, the statutes are so framed, or the courts have so construed them, that a judgment draws interest at the same rate as the instrument or cause of action on which it is founded, provided such rate of interest does not exceed the highest rate of legal interest.[122] Thus, if a contract specifies a rate of interest, not beyond the percentage which the parties may legally contract for, and a judgment is rendered thereon, it bears interest at the contract rate, and not at the rate which all contracts carry if no rate be stipulated therein.[123] Under a statute of this

[118] Simmons v. Garrett, McCahon (Kan.) 82.

[119] Bibend v. Liverpool & L. Fire & Life Ins. Co., 30 Cal. 78.

[120] Whereatt v. Ellis, 68 Wis. 61, 30 N. W. 520.

[121] Verree v. Hughes, 11 N. J. Law, 91; Hawkins v. Ridenhour, 13 Mo. 125; White v. Haffaker, 27 Ill. 349; Wayman v. Cochrane, 35 Ill. 152; Guernsey Branch of State Bank v. Kelley, 14 Ohio St. 367; McCutchen v. Dougherty, 44 Miss. 419; Board County Com'rs Cheyenne County v. Board County Com'rs Bent County, 15 Colo. 320, 25 Pac. 508.

[122] Wilson v. King, Morris (Iowa) 106; Lane v. Gluckauf, 28 Cal. 288, 87 Am. Dec. 121; Gautier v. English, 29 Cal. 165; Hagood v. Aikin, 57 Tex. 511; City of Burrton v. Harvey County Savings Bank, 28 Kan. 390; State v. Vogel, 14 Mo. App. 187; Neal v. Brockhan, 87 Ga. 130, 13 S. E. 283; Crook v. Tull, 111 Mo. 283, 20 S. W. 8; Catron v. Lafayette County, 125 Mo. 67, 28 S. W. 331. As to construction of such a statute, with reference to contracts for compound interest, see Raun v. Reynolds, 11 Cal. 14.

[123] Daniel v. Gibson, 72 Ga. 367, 53 Am. Rep. 845.

kind, where a contract bears interest at the rate of 12 per cent., with a stipulation for 10 per cent. attorney's fees, judgment on it is properly entered for the sum of principal, interest, and attorney's fees, the whole to bear 12 per cent. interest from its date.[124] Where the interest agreed upon in the note or other contract is usurious, still a judgment recovered for so much of the claim as is collectible by law will bear interest from its rendition.[125] It remains to be stated that a state statute reducing the rate of interest thereafter to accrue and be payable on judgments is not unconstitutional, although it may apply to judgments recovered before its enactment,[126] but such a law will not be interpreted to apply retroactively to judgments already rendered, unless its plain terms require such a construction.[127]

§ 983. Interest on Decrees in Equity.

Where a judgment does not at law bear interest, equity, following the law, will not give interest.[128] But upon the equity of a statute allowing interest to be collected upon executions issued upon judgments rendered on contracts or on prior judgments, complainants in chancery are entitled to interest upon decrees in similar cases, and the decree should be so drawn as to direct the payment of interest, upon the amount decreed, until such amount is paid according to the directions of the decree, so that the interest may be levied upon the execution.[129] In respect to interest, a decree has the same force as a judgment when it contests with other liens or claims for money. But this refers only to a decree in personam binding all the property

[124] Llano Improvement & Furnace Co. v. Watkins, 4 Tex. Civ. App. 428, 23 S. W. 612.

[125] Ramsey v. Thomas, 14 Tex. Civ. App. 431, 38 S. W. 259; Shafer v. First Nat. Bank, 53 Kan. 614, 36 Pac. 998.

[126] Morley v. Lake Shore & M. S. Ry. Co., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925. And see, supra, vol. 1, § 8.

[127] Brauer v. City of Portland, 35 Or. 471, 60 Pac. 378.

[128] McMillen v. Scott, 1 T. B. Mon. (Ky.) 150. And see McAlexander v. Lee, 3 A. K. Marsh. (Ky.) 483; Moore v. Pendergrast's Heirs, 6 J. J. Marsh. (Ky.) 534; Crocker v. Clements' Adm'r, 23 Ala. 296; Lair v. Jeff, 3 Dana (Ky.) 181; Hunt v. Smith, 3 Rich. Eq. (S. C.) 465.

[129] Ryckman v. Parkins, 5 Paige (N. Y.) 543; Stuart v. Hurt, 88 Va. 343, 13 S. E. 438.

of the debtor, and rendered against the defendant without reference to the sale of particular property and the distribution of the fund arising therefrom.[130] In New Jersey, "decrees in equity as well as judgments at law universally bear the legal rate of interest, without regard to the terms of the contract, or to the place where it was executed, whether within the state or abroad." [131]

§ 984. Compounding Interest.

It is held in some of the cases that where a former judgment is sued on, interest accrued on it is properly added to the principal, and judgment rendered on the whole amount to bear interest from the date of the last judgment.[132] But there are also authorities which oppose this rule.[133] In California, where the plaintiff in a suit on a judgment recovered against an intestate in his lifetime, has judgment, interest is not to be compounded, but must be allowed upon the sums in the judgment sued on, according to the legal rates respectively applicable thereto.[134]

§ 985. Limitation of Actions on Judgments.

In most, if not all, of the states the statutes of limitation either expressly prescribe a period within which suits on judgments must be brought, or are so framed as to include such actions by necessary implication.[135] Where the law enacts that such a suit shall be commenced within a certain number of years "next after the judgment was entered," in computing the time within which the action may be brought, the day on which the judgment was entered is to be ex-

[130] National Bank of Augusta v. Heard, 65 Ga. 189.

[131] Wilson v. Marsh, 13 N. J. Eq. 289.

[132] Heidenheimer v. Johnston, 76 Tex. 200, 13 S. W. 46. See, also, Corcoran v. Doll, 32 Cal. 82; The Umbria, 11 U. S. App. 691, 8 C. C. A. 181, 59 Fed. 475.

[133] Pinckney's Adm'r v. Singleton, 2 Hill (S. C.) 343. And in Re Fuller, 1 Sawy. 243, Fed. Cas. No. 5,148, it was held that a stipulation in a judgment that the interest on it shall bear interest, if not paid annually, is void, but the judgment itself is not usurious.

[134] Quivey v. Hall, 19 Cal. 97.

[135] See Mason v. Cronise, 20 Cal. 211; Kennard v. Alston, 62 Miss. 763; Succession of Rice, 15 La. Ann. 649; Reay v. Heazelton, 128 Cal. 335, 60 Pac. 977.

cluded.[136] In New York, and probably in some other states, it is held that after a justice's judgment has become barred by the statute of limitations, it will be so revived by a new promise of payment as that an action of debt may be maintained upon it with the same effect as before the statute had attached.[137] A common provision in statutes of limitation of this class is that no action shall be maintained upon a judgment unless commenced within a certain number of years after the issuance of the last execution upon it, or after a motion or other proceeding to revive it.[138] But it is held that the issuance of a writ of garnishment by the judgment creditor is not equivalent to an execution, so as to prevent the running of the statute against the judgment.[139] Nor is the bringing of an action to enforce payment of the judgment sufficient to toll the statute.[140] And where the law provides that limitations shall not run during the time a party was stayed from bringing his action on the judgment by any injunction or order of court, or by statutory prohibition, the bringing of an action on the judgment is not "stayed," within its meaning, during the time the creditor is required to obtain leave of court in order to bring suit on the judgment.[141] In case of an assignment of a judgment in favor of the state, the statute will begin to run as against the assignee from the date of the assignment.[142] A new statute of limitations may be made retrospectively applicable to existing judgments, without violating the constitutional prohibitions, since it affects the remedy merely.[143] And a state does not withhold from the judgments of the federal courts the credit

136 Warren v. Slade, 23 Mich. 1, 9 Am. Rep. 70; Connecticut Nat. Bank v. Payles, 17 App. Div. 596, 45 N. Y. Supp. 305. And see Galt v. Todd, 5 App. D. C. 350. See, per contra, Cook v. Moore, 95 N. C. 1.

137 Carshore v. Huyck, 6 Barb. 583. And see Pease v. Howard, 14 Johns. 479.

138 See St. Louis Type Foundry v. Jackson, 128 Mo. 119, 30 S. W. 321; McKinnon v. McGown (Tex. Civ. App.) 29 S. W. 696; Rowe's Adm'r v. Hardy's Adm'r, 97 Va. 674, 34 S. E. 625; Thatcher v. Lyons, 70 Vt. 438, 41 Atl. 428, 67 Am. St. Rep. 677.

139 Shields v. Stark (Tex. Civ. App.) 51 S. W. 540.

140 Swafford v. Howard (Ky.) 50 S. W. 43.

141 Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72, 46 L. R. A. 715, 81 Am. St. Rep. 516.

142 Predohl v. O'Sullivan, 59 Neb. 311, 80 N. W. 903.

143 Warner v. Bartle, 39 App. Div. 91, 56 N. Y. Supp. 585.

and efficacy which is due to them, in limiting, by statute, the time within which actions may be brought on the judgments of such courts in its own courts.[144]

§ 985a. Mandamus to Enforce Judgments against Municipal Corporations.

As a general rule, the property of a municipal corporation necessary to the exercise of its functions, such as markets, prisons, town halls, etc., or property which has been destined and set apart by statute as a source of permanent revenue for the corporation, cannot be seized or sold on execution against it.[145] Nor can its taxes or public revenues be levied on under an execution in favor of a private creditor.[146] And in several of the states, it is now well settled that the writ of execution cannot be employed at all when the judgment debtor is a municipality.[147] In these circumstances, the legal method of enforcing the payment of a judgment against a municipal corporation is by a writ of mandamus, issuing from a court of competent jurisdiction, and based on proper proceedings, commanding the officers of the corporation to pay the judgment out of public funds in their hands, or to levy and collect taxes sufficient in amount to discharge the obligation. The writ, as thus employed, is in the nature of the statutory writ of execution and is legally equivalent thereto.[148] Accordingly, we find numerous decisions recognizing the power of the courts of a state to issue the writ of mandamus to compel the payment of judgments recovered against the municipal corporations of the state, either in the state's own courts or in the federal courts

[144] Waterman v. Town of Waterloo, 69 Wis. 260, 34 N. W. 137.

[145] New Orleans v. Morris, 3 Woods, 103, Fed. Cas. No. 10,182.

[146] Peterkin v. New Orleans, 2 Woods, 100, Fed. Cas. No. 11,026.

[147] City of Olney v. Harvey, 50 Ill. 453, 99 Am. Dec. 530; Amy v. City of Galena (C. C.) 7 Fed. 163; United States v. Board of Auditors of Town of Ottawa (C. C.) 28 Fed. 407. But in some states, the collection of judgments against municipal corporations of certain classes, by means of the writ of execution, is expressly authorized. See Hart v. City of New Orleans (C. C.) 12 Fed. 292; Allen v. Dubois Borough, 5 Pa. Dist. R. 585. And where this remedy is authorized by statute, it is exclusive, and proceedings by mandamus cannot be sustained. Comm. v. Pease, 1 Dauph. Co. R. (Pa.) 47.

[148] United States v. Township of Oswego (C. C.) 28 Fed. 55.

sitting within its borders.[149] And where a plaintiff has shown himself entitled to a mandamus to compel the levy and collection of taxes by a county to pay a judgment against it, he is entitled to one which will set in motion all the machinery necessary to raise and apply the money, including action on the part of all necessary officers.[150] But in regard to the exigence of the writ, the court is vested with a considerable measure of discretion. Thus, where the amount of the tax required is very large in proportion to the resources of the municipality, it is within the discretion of the court issuing the mandamus to decide whether it shall be collected at one time or raised by successive levies.[151] And so, where the municipality has an option to pay the debt either by levying a tax or by issuing bonds, a mandamus recognizing the option, and requiring it to do one or the other, would not be bad for uncertainty; but if the corporation has expressly refused to issue bonds, it is not error, when mandamus issues, to make it require absolutely the levy of a tax.[152]

§ 985b. Same; Power of Federal Courts.

When a judgment has been recovered in a federal court having jurisdiction over the parties and the subject-matter, against a city, county, or other municipal corporation of a state, and the creditor has no other remedy or means of making his judgment effective, he will be entitled to a writ of mandamus, directed to the proper officers of the municipality, requiring them to pay the judgment out of public funds in their hands, or to levy and collect a tax sufficient in amount to satisfy the judgment and costs. The writ, in such a case, is in the nature of an execution, and is ancillary and necessary

[149] State v. Town of Beloit, 20 Wis. 85; State v. City of Madison, 15 Wis. 30; United States v. King (C. C.) 74 Fed. 493; People v. Marsh, 21 App. Div. 88, 47 N. Y. Supp. 395; State v. City of New Orleans, 49 La. Ann. 946, 22 South. 370; White v. City of Decatur, 119 Ala. 476, 23 South. 999; State v. Harris, 17 Ohio St. 608; Supervisors v. Randolph, 89 Va. 614, 16 S. E. 722. Sheridan v. Fleming, 93 Mo. 321, 5 S. W. 813; Dearing v. Shepherd, 78 Ga. 28; Wells v. Town of Mason, 23 W. Va. 456; Stevens v. Miller, 3 Kan. App 192, 43 Pac. 439; Evans v. Bradley, 4 S. D. 83, 55 N. W. 721.

[150] Marion County v. Coler, 21 C. C. A. 392, 75 Fed. 352.

[151] City of East St. Louis v. United States, 120 U. S. 600, 7 Sup. Ct. 739. 30 L. Ed. 798; United States v. City of Key West, 23 C. C. A. 663, 78 Fed. 88.

[152] United States v. City of Key West, 23 C. C. A. 603, 78 Fed. 88.

to the jurisdiction of the federal court in the original case.[153] So, where the state law provides specifically for the auditing of charges against a municipality, among which judgments are included, and for the levy of taxes to pay them, auditing a judgment is a mere ministerial act, the performance of which can be coerced by mandamus.[154] Further, if the remedy by mandamus does not at first prove effectual, it may be repeated again and again and as often as the occasion requires.[155] But when the writ of mandamus is thus resorted to for the purpose of compelling a municipal corporation to levy a tax, the federal court will conform as much as possible to the state practice in similar cases.[156]

The rightful power and authority of the federal courts in this particular cannot be abridged or interfered with by the authority of the state, manifested either through its legislature or its courts. Thus, if a statute of the state prohibits the issuance of writs of mandamus against a city, it must be confined in its operation to the courts of the state; it cannot constitutionally have any effect as to the remedies on judgments rendered against a city by the courts of the United States.[157] Again, the state courts have no more right or authority to interfere with the enforcement of the writ of man-

[153] City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560; United States v. City Council of Keokuk, 6 Wall. 514, 18 L. Ed. 933; Walkley v. Muscatine, 6 Wall. 481, 18 L. Ed. 930; Weber v. Lee County, 6 Wall. 210, 18 L. Ed. 781; Morgan v. Town Clerk, 7 Wall. 610, 19 L. Ed. 203; Butz v. Muscatine, 8 Wall. 575, 19 L. Ed. 490; Mayor, etc., of City of Davenport v. Lord, 9 Wall. 409, 19 L. Ed. 704; Rees v. Watertown, 19 Wall. 107, 22 L. Ed. 72; United States v. New Orleans, 98 U. S. 381, 25 L. Ed. 225; Cass County v. Johnston, 95 U. S. 360, 24 L. Ed. 416; Knox County v. Aspinwall, 24 How. 376, 16 L. Ed. 735; Deuel County v. First Nat. Bank of Buchanan Co., 30 C. C. A. 30, 86 Fed. 264; United States v. Board of Auditors (C. C.) 28 Fed. 407; Shelley v. St. Charles County (C. C.) 30 Fed. 603; United States v. Judges of Scotland County (C. C.) 32 Fed. 714; In re Copenhaver (C. C.) 54 Fed. 660; United States v. Muscatine County, 1 Dill. 522, Fed. Cas. No. 16,538; Jenkins v. Supervisors, 1 Hughes, 568, Fed. Cas. No. 7,261; Ex parte Parsons, 1 Hughes, 282, Fed. Cas. No. 10,774; United States v. Jefferson County, 5 Dill. 310, Fed. Cas. No. 15,472; Same v. Lincoln County, 5 Dill. 184, Fed. Cas. No. 15,503; Same v. Lee County, 2 Biss. 77, Fed. Cas. No. 15,589.

[154] Lower v. United States, 91 U. S. 536, 23 L. Ed. 420.

[155] Rees v. Watertown, 19 Wall. 107, 22 L. Ed. 72.

[156] Wisdom v. Memphis, 2 Flip. 285, Fed. Cas. No. 17,903.

[157] Hart v. City of New Orleans (C. C.) 12 Fed. 292.

damus, thus issued, by injunction or by attempting to replevy property seized by the tax collector, than they have to interfere with the marshal, when he is proceeding under an ordinary writ of execution.[158] Hence, to a writ of mandamus, so issuing from a federal court, it is not an admissible or sufficient answer that the respondents have been enjoined by a state court from doing the act which the mandamus commands.[159] Nor is it a material circumstance that the injunction from the state court was issued before the mandamus from the federal court, prohibiting the same acts which the mandamus commands, and still remains in force. The mandamus, when issued, is to be regarded as a writ necessary to the exercise of the jurisdiction of the federal court which had previously attached, and to enforce its judgment, and hence the state court is not to be regarded as in prior possession of the case.[160]

§ 985c. Same; Prerequisites to Issuance of Writ.

In the federal courts, the writ of mandamus can be used only in aid of a jurisdiction which has already attached; and it is a writ in the nature of an execution to carry into effect a judgment previously rendered. Further, as a general rule, the determination of the validity of a claim against a municipal corporation, and approval of it, is a judicial function, before the recovery of judgment, and therefore cannot be coerced by mandamus; but the allowance or approval of the claim, after judgment upon it, is a mere ministerial act. For these reasons the holder of the claim must sue on

[158] United States v. Treasurer of Muscatine County, 1 Dill. 522, Fed. Cas. No. 16,538; Apperson v. Memphis, 2 Flip. 363, Fed. Cas. No. 497; Weber v. Lee County, 6 Wall. 210, 18 L. Ed. 781; Riggs v. Johnson County, 6 Wall. 166, 18 L. Ed. 768; Mayor, etc., of City of Davenport v. Lord, 9 Wall. 409, 19 L. Ed. 704; Supervisors of Washington County v. Durant, 9 Wall. 415, 19 L. Ed. 732; Amy v. Barkholder, 11 Wall. 136, 20 L. Ed. 101.

[159] United States v. Lee County, 2 Biss. 77, Fed. Cas. No. 15,589; Hill v. Scotland County Court (C. C.) 32 Fed. 716; United States v. King (C. C.) 74 Fed. 493; Clews v. Lee County, 2 Woods, 474, Fed. Cas. No. 2,892.

[160] Riggs v. Johnson County, 6 Wall. 166, 18 L. Ed. 768; Hawley v. Fairbanks, 108 U. S. 543, 2 Sup. Ct. 846, 27 L. Ed. 820; Clews v. Lee County, 2 Woods, 474, Fed. Cas. No. 2,892; Smith v. Tallapoosa County, 2 Woods, 398, Fed. Cas. No. 13,114; Supervisors of Washington County v. Durant, 9 Wall. 415, 19 L. Ed. 732.

it and recover judgment before the federal courts will aid him to enforce its payment by mandamus; and this, notwithstanding the fact that the claim could be directly enforced, in the state courts, by means of the writ, without first reducing it to judgment.[161]

Where a levy of taxes is desired by a judgment creditor of a municipal corporation for the payment of his claim, and his right is based upon the ordinary status of a judgment creditor and the power of the municipal authorities to make a levy, a demand upon the proper officers for a levy to pay the judgment must be made before relief by mandamus can be had. But it is not necessary that the demand should be to levy a special tax; a definite demand or request to levy a tax to pay the judgment is enough.[162] And in some jurisdictions it is held that a demand for payment is sufficient, being equivalent to a demand for the levy of a tax; since the demand of payment is held to include a demand to do any particular thing necessary to such payment.[163] Also a formal demand for payment may be dispensed with, or rendered unnecessary, by long continued neglect of the municipality to make any provision for the payment of judgments against it. On this point it has been remarked: "While it is generally true that a court will not issue a mandamus to compel the performance of an act which it is merely anticipated that the defendant will not perform, still, if the defendant has shown by his conduct that he does not intend to perform the act, and that fact is apparent to the court, it would be a work of supererogation to require that a demand should be made for its performance." [164]

[161] Greene County v. Daniel, 102 U. S. 187, 26 L. Ed. 99; Davenport v. Dodge County, 105 U. S. 237, 26 L. Ed. 1018; Chickaming v. Carpenter, 106 U. S. 663, 1 Sup. Ct. 620, 27 L. Ed. 307; Osborne v. Board of Com'rs of Adams County (C. C.) 7 Fed. 441; United States v. Buchanan County, 5 Dill. 285, Fed. Cas. No. 14,679.

[162] State v. City of Jacksonville, 22 Fla. 21; United States v. Indian Grave Drainage Dist., 29 C. C. A. 578, 85 Fed. 928.

[163] City of Cairo v. Everett, 107 Ill. 75.

[164] United States v. Board of Town Auditors of Town of Brooklyn, 10 Biss. 466, 8 Fed. 473; Board of Supervisors v. Thompson, 10 C. C. A. 154, 61 Fed. 914.

§ 985d. Same; Defenses; Impeachment of Judgment.

On an application for a writ of mandamus to compel the payment of a judgment against a municipal corporation, the original judgment is conclusive of all matters which were or might have been set up in defense to the action, and it cannot be impeached collaterally.[165] So also, questions which have been decided by courts of last resort, on applications for mandamus to enforce certain judgments against a municipality, are res judicatæ on a subsequent application by the same party to enforce a new judgment, into which unpaid balances on the original judgments have been merged together with other judgments, in so far as concerns the remainder of the original judgments, though not as to the additional judgments merged with them.[166]

The defense of limitations may be interposed on an application for this writ. That is to say, when a judgment has ceased to be operative, by the expiration of the time during which an execution could be issued on it, it can no longer be enforced by mandamus.[167] But the fact that the time during which a judgment attaches as a lien upon real estate may have elapsed is no impediment to the issuance of a mandamus to enforce its payment, provided the right to issue an execution as against personalty still remains.[168] But if a state, with the deliberate purpose of obstructing the creditor, repeals a municipal charter, whereby it results that there is no organization to be sued, and the creditor is disabled from proceeding, the time of such obstruction will be excluded from the limitation of the statute, the legislative intention to suspend it being implied, as in case of war. Moreover, it may be set up as an equitable defense against the statute in proceedings by mandamus.[169] A method is commonly provided by which judgments, on which the right to issue execution is lost, may be revived; and this is, of course, applicable

[165] Supra, § 253a, and cases there cited.

[166] Police Jury of Jefferson v. United States, 8 C. C. A. 607, 60 Fed. 249

[167] McAleer v. Clay County (C. C.) 42 Fed. 665; United States v. Township of Oswego (C. C.) 28 Fed. 55.

[168] Amy v. City of Galena (C. C.) 7 Fed. 163.

[169] Devereaux v. City of Brownsville (C. C.) 29 Fed. 742.

to judgments against municipalities, no less than to others. Under a statute providing that judgments may be revived by scire facias, a proceeding to revive a judgment against a city may be joined with an application for a mandamus to enforce its collection.[170] But the right to the aid of a writ of mandamus may be lost or impaired by the laches of the creditor, or his neglect to insist upon the full measure of his rights. Thus, it has been held that a delay of eight years in demanding by suit the payment of a claim against a county is such laches as will cause the courts to refuse a writ of mandamus.[171]

§ 985e. Same; Execution of Writ.

When mandamus issues from a federal court to compel the levy and collection of taxes to pay a judgment against a municipal corporation, the officers to whom the writ is directed must obey it or be liable to punishment for contempt; and this, notwithstanding the courts of the state have forbidden them to proceed and will punish them for contempt if they comply with the requirement of the writ.[172] And if municipal officers thus refusing to obey the mandate of the federal court are imprisoned for their contempt, it is no ground for their release on habeas corpus that their continued detention might seriously interfere with the collection of the county revenues, and thereby endanger the continuance of the state government.[173]

If there are no officers of the municipal corporation authorized to levy and collect the necessary taxes (or if their offices are temporarily vacant), the course which may be pursued is not entirely free from doubt. But it is the generally settled doctrine of the supreme court of the United States that, if the proper officers of the corporation neglect or refuse to obey a writ of mandamus requiring

[170] City of Houston v. Emery, 76 Tex. 282, 13 S. W. 264. And see Wonderly v. Lafayette County (C. C.) 74 Fed. 702.

[171] State v. Appleby, 25 S. C. 100.

[172] United States v. Silverman, 4 Dill. 224, Fed. Cas. No. 16,288; President v. City of Elizabeth (C. C.) 40 Fed. 799; United States v. Buchanan County, 5 Dill. 285, Fed. Cas. No. 14,679; United States v. Lee County, 2 Biss. 77, Fed. Cas. No. 15,589.

[173] In re Copenhaver (C. C.) 54 Fed. 660.

them to levy and collect taxes to pay a judgment, or if there are no officers authorized to perform these duties, it is not within the power of a federal court to appoint its own marshal or other officer to execute the writ, unless such a power may be derived from some law of the particular state and the adoption of such law by the federal courts as authorized by the Revised Statutes. "This power to impose burdens and raise money," it is said, "is the highest attribute of sovereignty, and is executed, first, to raise money for public purposes only, and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the federal judiciary to assume the place of a state in the exercise of this authority at once so delicate and so important." [174] If, therefore, the municipal authorities

[174] Rees v. Watertown, 19 Wall. 107, 22 L. Ed. 72. And see Barkley v. Levee Com'rs, 93 U. S. 258, 23 L. Ed. 893; Heine v. Levee Com'rs, 19 Wall. 655, 22 L. Ed. 223. While the federal courts will, in proper cases, compel the agents of a state to set in motion machinery existing under state authority for the collection of taxes, those courts will themselves neither create the machinery nor invest any person with power to use the same. O'Brien v. Wheelock (C. C.) 78 Fed. 673. In the case of Welch v. Ste. Genevieve, 1 Dill. 130, Fed. Cas. No. 17,372, the court appointed its marshal a special commissioner to assess, levy, and collect the tax; but this action was disapproved in Rees v. Watertown, 19 Wall. 107, 22 L. Ed. 72. A similar course was allowed to be valid and correct in Supervisors of Lee County v. Rogers, 7 Wall. 175, 19 L. Ed. 162, but this case arose in Iowa, and the proceeding was taken by the express authority of a statute of that state, which gave to the courts power to appoint a person to levy and collect the tax when the proper officer refused to obey a writ of mandamus requiring him to perform that duty; and this practice, thus prescribed by a law of the state, had been adopted, or could be adopted, by the federal courts sitting within the state, under Rev. St. U. S. § 916. There is also some authority for the position that the federal court may appoint its marshal to collect a tax which has been already duly levied or assessed, this being merely a ministerial duty. See United States v. Treasurer of Muscatine County, 1 Dill. 522, Fed. Cas. No. 16,538. And in Post v. Taylor County, 2 Flip. 518, Fed. Cas. No. 11,302, it appeared that certain holders of bonds issued by a county in aid of a railroad had recovered judgments in the federal court for overdue interest. Mandamus was issued to the proper officers of the county requiring them to assess and collect taxes to pay these judgments. An assessment of taxes was duly made and reported to the court, but the officers also reported that they were not able to find any qualified person to accept the office of collector and collect the taxes. The court then appointed a receiver, and gave him authority to collect the tax; but he was soon induced, by threats of violence, to resign his position. There-

refuse to make the levy, the remedy is to constrain them by attachment, as for contempt, not to appoint new officers; and if there are no municipal officers who can make the levy, the judgment creditor is in fact without a remedy, and can only apply to the legislature for relief.[175] Where officers of a municipality have resigned in order to avoid auditing and paying a judgment against the corporation, it is not a sufficient return to an alternative writ of mandamus that the respondents had resigned. If it does not also appear that their successors have been elected or appointed, and qualified, they will be ordered to audit the judgment.[176] But if the governor of the state refuses to appoint a receiver, authorized by statute to collect the taxes already levied by a municipal corporation whose charter has been repealed, a federal court will not undertake to compel an appointment by mandamus, because the writ will not be issued where it is likely to be nugatory and cannot be enforced.[177]

§ 985f. Same; Effect of Limitation of Taxing Power of Municipality.

When a municipal corporation is created, the power of taxation is vested in it as an essential attribute, for all the purposes of its existence, unless its exercise is in express terms prohibited. When authority to borrow money or incur an obligation in order to execute a public work is conferred upon a municipal corporation, the power to levy a tax for its payment accompanies it, without any spe-

upon the judgment creditors filed their bill in equity against the county and several of the most prominent tax payers therein, and it was held that the court would take jurisdiction, and would direct the defendants to pay their taxes into the registry of the court, to be applied in satisfaction of the judgments, and execution would be issued against each defendant debtor who did not so pay within 90 days; and if the sums thus collected were not sufficient, a receiver would again be appointed, authorized to collect the taxes from property holders not parties to the cause, and if they would not pay within a reasonable time, the receiver would be instructed to bring them before the court by ancillary petition.

[175] Barkley v. Levee Com'rs, 93 U. S. 258, 23 L. Ed. 893.

[176] United States v. Badger, 6 Biss. 308, Fed. Cas. No. 14,493. And see Gorgas v. Blackburn, 14 Ohio, 252.

[177] Devereaux v. City of Brownsville (C. C.) 29 Fed. 742.

cial mention that such power is granted.[178] Hence it would seem to follow that unless municipal taxation beyond a certain limit is expressly forbidden, it is no defense to an application for mandamus that taxation up to that limit has already been laid. But the writ of mandamus will not issue to compel the officers of a municipal corporation to levy a greater tax than they are allowed by the law of the state to levy, nor to compel the levy of a special tax, when they have already, in the general levy, exercised the taxing power of the municipality to the limit allowed by its charter or the laws of the state.[179] But although it appears that the estimate of municipal expenses is sufficient to exhaust the revenue which the corporation is allowed to raise by taxation, yet if it appears that such expenses can be reduced by judicious management, and a portion of the revenues applied to the payment of judgment creditors, that course ought to be pursued, and the court may, by mandamus, require that it shall be pursued.[180] And when the limitation on the taxing power of a municipal corporation renders it impossible to raise sufficient by a single levy to pay off a judgment which is made the basis of an application for mandamus, it is competent for the court to order that additional levies be made from year to year until the entire indebtedness is discharged.[181]

Where a state has authorized a municipal corporation to enter into a contract and to exercise the power of local taxation to an extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied; and the state has no power to impair the obligation of the contract by taking away the taxing power of the corporation, or so reducing it as to leave it inadequate to satisfy the requirements of the contract; and, the con-

[178] United States v. New Orleans, 98 U. S. 381, 25 L. Ed. 225. Compare Board Com'rs Grand County v. King, 14 C. C. A. 421, 67 Fed. 202.

[179] Supervisors of Carroll County v. United States, 18 Wall. 71, 21 L. Ed. 771; United States v. Macon County, 99 U. S. 582, 25 L. Ed. 331; United States v. Clark County, 95 U. S. 769, 24 L. Ed. 545; Louisiana v. United States, 103 U. S. 289, 26 L. Ed. 358; Clay County v. McAleer, 115 U. S. 616, 6 Sup. Ct. 199, 29 L. Ed. 482; Stewart v. Jefferson Police Jury, 116 U. S. 135, 6 Sup. Ct. 332, 29 L. Ed. 588; State v. Sheldon, 53 Neb. 365, 73 N. W. 694.

[180] Deuel County v. First Nat. Bank, 30 C. C. A. 30, 86 Fed. 264.

[181] Coy v. Lyons City, 17 Iowa, 1, 85 Am. Dec. 539.

tract or obligation having been reduced to judgment, a federal court can proceed by mandamus to enforce its payment, as if no such restrictive legislation had ever been attempted.[182]

[182] Von Hoffman v. Quincy, 4 Wall. 535, 18 L. Ed. 403; City of Galena v. Amy, 5 Wall. 705, 18 L. Ed. 560; Memphis v. United States, 97 U. S. 293, 24 L. Ed. 920; Wolff v. New Orleans, 103 U. S. 358, 26 L. Ed. 395; Nelson v. St. Martin's Parish, 111 U. S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574; United States v. Port of Mobile, 4 Woods, 536, 12 Fed. 768.

CHAPTER XXV.

PAYMENT AND SATISFACTION OF JUDGMENTS.

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PART I. PAYMENT BY JUDGMENT-DEBTOR.

§ 986. To Whom Payment may be Made.

Payment of a judgment must be made to the real owner of the judgment, or to some one authorized in law or fact to receive the money for him. The party who has the exclusive right to merge a claim into a judgment, and after judgment to make the money on an execution, must be regarded in law as the owner of the judgment.[1] In case there are several plaintiffs in the judgment, payment may be made to either, with the effect of discharging the whole obligation.[2] Where a judgment is taken in the name of one who is merely a nominal party thereto, a payment by a garnishee of the debtor to the real party in interest will operate to discharge the judgment.[3] We have already seen that in case of an assignment of the judgment, the debtor must be notified. Any payment made by him, before such notice, to the original creditor is valid.[4] The payment of a judgment or decree to the attorney of record who obtained it, before his authority is revoked or before due notice of such revocation is given to the defendant, is valid and binding on the plaintiff, so far at least as the defendant is concerned.[5] Payment may also, as a matter of course,

[1] Lacey v. Waples, 28 La. Ann. 158; Wills v. Chandler (C. C.) 2 Fed. 273; Mervine v. Parker, 18 Ala. 241. Where money is paid into court on a judgment which different persons claim to own, and there are material questions of fact in dispute, the court may award an issue to determine the ownership. Mahon v. Rosenkrantz, 8 Kulp (Pa.) 334.

[2] Erwin v. Rutherford, 1 Yerg. (Tenn.) 169; American Fire Ins. Co. v. Landfare, 56 Neb. 482, 76 N. W. 1068.

[3] Matter v. Phillips, 52 Iowa, 232, 3 N. W. 49.

[4] Supra, § 950. And see The Lulie D., 4 Biss. 249, Fed. Cas. No. 8,602; Seymour v. Smith, 17 Abb. N. C. (N. Y.) 387. A payment on a judgment to the original judgment creditor, after notice of an assignment to other parties, is no defense to the enforcement of such judgment. Moore v. Red (Miss.) 22 South. 948.

[5] Yoakum v. Tilden, 3 W. Va. 167, 100 Am. Dec. 738; Harper v. Harvey,

be made to an agent of the plaintiff duly authorized to collect the judgment,[6] or to the prochein ami of an infant plaintiff who has no regular guardian.[7] The debtor may also pay the money to the clerk of the court before an execution issues, or after the execution has been returned, but the clerk has no authority to receive payment while the execution is in the hands of the sheriff.[8] Nor has the clerk

4 W. Va. 539; Baltimore & O. R. Co. v. Fitzpatrick, 36 Md. 619; Brackett v. Norton, 4 Conn. 517, 10 Am. Dec. 179; Wilkinson v. Holloway, 7 Leigh (Va.) 277. See Myers v. Zeek, 151 Pa. 423, 25 Atl. 106; Faughnan v. City of Elizabeth, 58 N. J. Law, 309, 33 Atl. 212. The appearance of an attorney in a case, and the satisfaction of the judgment by him, are presumed to be by authority of the client; and such a satisfaction will not be stricken off years afterwards, when the attorney is dead, on the ground of his want of authority in the premises. Miller v. Preston, 154 Pa. 63, 25 Atl. 1041. But if nothing appears of record to show any authority on the part of an attorney claiming to represent the judgment creditor, a person paying to him the amount of the judgment must exercise care and prudence in ascertaining the extent of the attorney's authority; if he fails to make proper inquiries, he pays the money at his own peril. Ely v. Lamb, 10 Pa. Co. Ct. R. 209.

[6] See Miller v. Preston, 154 Pa. 63, 25 Atl. 1041; Vermont Loan & Trust Co. v. McGregor (Idaho) 53 Pac. 399. The parol assignment of a judgment constitutes the assignee an agent for the plaintiff, and payment to such agent discharges the judgment. Bartlett v. Yates, 52 N. C. 615. In a case where a party against whom a bank had obtained a judgment subsequently deposited money with a branch of the bank, which was lost by the insolvency of the bank, and the judgment passed by assignment to plaintiff, it was held that the deposits did not extinguish the judgment, nor could they be allowed as a set-off against the judgment in the hands of the assignee. Spilman v. Payne, 84 Va. 435, 4 S. E. 749. Where a stranger represents by a forged memorandum that he is plaintiff's agent, and thus employs an attorney to satisfy the judgment, who thereupon satisfies it, and the stranger embezzles the money, if the plaintiff is not in any fault, the defendant must bear the loss. Guiles v. Murray, 22 Pa. Co. Ct. R. 99.

[7] Morgan v. Thorne, 7 Mees. & W. 400; Collins v. Brook, 4 Hurl. & N. 270.

[8] Bynum v. Barefoot, 75 N. C. 576; Hawkeye Ins. Co. v. Luckow, 76 Iowa. 21, 39 N. W. 923; Haynes v. Wheat, 9 Ala. 239; Portland Const. Co. v. O'Neil. 24 Or. 59, 32 Pac. 766. But in several of the states it is held that the clerk of the court has no right to receive money from the defendant in satisfaction of a judgment, without special authority. Seymour v. Haines, 104 Ill. 557; Lewis v. Cockrell, 31 Ill. App. 476; Durant v. Gabby, 2 Metc. (Ky.) 91; Baker v. Hunt, 1 Wend. (N. Y.) 103; Wells v. Baird, 3 Pa. 351. And see Hendry v. Benlisa, 37 Fla. 609, 20 South. 800, 34 L. R. A. 283. Where a decree requires the payment of a certain sum to "complainant" within a certain time under pain of forfeiture, a deposit of such sum with the register of the court is not a compliance therewith. Lewis v. Kean, 102 Mich. 605, 61 N. W. 63.

the power to receive payment of the debt before it has been reduced to judgment. But if he receives the money and retains it until after judgment, and by some plain and unequivocal act shows an intention to hold the money in his official capacity and apply it to the payment of the judgment, the judgment will be discharged.[9] If the debtor pays the amount of the judgment to the sheriff, who holds an execution for its collection, he is entitled to have the judgment entered satisfied, although the creditor never receives the money.[10] But payment to a sheriff when he has no writ in his hands authorizing a levy, will not discharge the debt.[11] Payment to a deputy sheriff, who holds the judgment and assumes the right to receive payment, does not release the debtor from liability, unless the deputy is authorized by a judicial mandate to proceed to collect and acquit the debtor, or the collection is made by the deputy as agent of the plaintiff, irrespective of office.[12] Where a judgment-debtor has had no notice of the transfer and subrogation of record of the judgment to a third party, payment by him of the amount of the judgment, under process of garnishment, to a creditor of the judgment-plaintiff, will discharge the debt.[13] And so also where the assignment was entirely void.[14] And generally, if the judgment debtor has been compelled, by garnishment, to pay a debt of his judgment creditor, the amount so paid should be allowed as a credit on the judgment.[15]

§ 987. Medium of Payment.

The owner of a judgment may receive property, securities, or any other thing of value in satisfaction of the same, if he so chooses, and when he has once accepted any substitute for money, his acceptance becomes irrevocable.[16] Thus a judgment may be satisfied, the cred-

[9] Governor v. Read, 38 Ala. 252.

[10] Beard v. Millikan, 68 Ind. 231.

[11] Lofland v. Jefferson, 4 Har. (Del.) 303; Irwin v. McKee, 25 Ga. 646; Wyer v. Andrews, 13 Me. 168, 29 Am. Dec. 497.

[12] Bailey v. Hester, 101 N. C. 538, 8 S. E. 164.

[13] Drumm v. Sherman, 20 La. Ann. 96. The rule is otherwise in New York. Robinson v. Weeks, 6 How. Prac. 161; Richardson v. Ainsworth, 20 How. Prac. 530.

[14] Lawrence v. Martin, 22 Cal. 173.

[15] Brandenburgh v. Beach (Ky.) 32 S. W. 168.

[16] Lyon v. Northrup, 17 Iowa, 314; Ives v. Phelps, 16 Minn. 451 (Gil. 407);

itor assenting, by the giving of a note secured by a deed of trust on land,[17] or a check of a third party,[18] or a bond and mortgage on real estate,[19] or drafts for various amounts due at stated different times.[20] But the consent of the creditor to a substituted medium of payment must be unequivocally manifested. His mere acceptance of a note for the full amount of the judgment does not operate to satisfy or discharge the judgment, unless it is expressly so agreed.[21] Hence a note given by the judgment-debtor to the creditor for the amount of the debt, but designed only to fix the time for payment, and after maturity returned to the maker, is no satisfaction of the judgment.[22] But it seems that if the plaintiff, on receiving collateral security for his judgment, covenants and agrees never to enforce it, this will operate as a discharge of the judgment.[23] While the plaintiff himself possesses this right of accepting payment otherwise than in money, at his option, no one else can exercise that option for him. His attorney cannot be supposed to possess the power. On the contrary, the debtor must affirmatively prove that the attorney was directly authorized to accept payment in that which was substituted for money.[24] And it is well settled that a sheriff or other collecting officer has no power to receive anything in satisfaction of a claim placed in his hands for collection but money, or bank notes cir-

Weston v. Clark, 37 Mo. 572. See President, etc., of Planters' Bank v. Calvit, 3 Smedes & M. (Miss.) 143, 41 Am. Dec. 616. Potter v. Hartnett, 148 Pa. 15, 23 Atl. 1007; Musser v. Gray (Cal.) 31 Pac. 568. But property delivered by the debtor to the creditor subsequent to the rendition of a judgment is not a part payment, unless both the delivery and the receipt were with the intention that it should be such, since a tender cannot be made in goods. Lofland v. McDaniel, 1 Pennewill (Del.) 416, 41 Atl. 882. The acceptance of Confederate money, during the Civil War, in payment of a judgment, constituted a valid settlement. Hendry v. Benlisa, 37 Fla. 609, 20 South. 800, 34 L. R. A. 283.

[17] Bushong v. Taylor, 82 Mo. 660.

[18] Lyon v. Northrup, 17 Iowa, 314.

[19] La Farge v. Herter, 11 Barb. (N. Y.) 159.

[20] Woolfolk v. Degelos, 24 La. Ann. 169.

[21] Riggs v. Goodrich, 74 Mo. 108; McCoy v. Hazlett, 14 Kan. 430; Schneider v. Meyer, 56 Mo. 475.

[22] Schneider v. Meyer, 56 Mo. 475.

[23] Chambers v. McDowell, 4 Ga. 185.

[24] Portis v. Ennis, 27 Tex. 574. See Kallander v. Neidhold, 112 Mich. [illegible], 70 N. W. 892.

culating as such, without authority from the plaintiff. A payment in any other way is no satisfaction of the judgment, and the plaintiff may proceed against the debtor.[25]

§ 988. Tender.

It is held that a tender by a judgment-debtor to the judgment-creditor of the full amount of the debt, in a currency which the creditor is required by law to receive, is not of itself a satisfaction of the judgment or a discharge of its lien. The remedy of the debtor, if the tender is refused, is to apply to the court to restrain the sale under execution and enter satisfaction of the judgment.[26]

§ 989. Payment of Less than Whole Amount.

It is held in some of the cases, following the rule of the common law, that a part payment of a judgment, under a parol agreement that such payment shall be accepted as full satisfaction, does not discharge the judgment;[27] although the case is otherwise if the agreement is evidenced by a sealed instrument acknowledging satisfaction.[28] But there are numerous other authorities which hold that compromise and part payment of a judgment, on a verbal agree-

[25] Draper v. State, 1 Head (Tenn.) 262; Crutchfield v. Robins, 5 Humph. (Tenn.) 15, 42 Am. Dec. 417; Heald v. Bennett, 1 Doug. (Mich.) 513; Mitchell v. Hockett, 25 Cal. 539, 85 Am. Dec. 151; Alcardi v. Robbins, 41 Ala. 541, 94 Am. Dec. 614; Ellis v. Smith, 42 Ala. 349; Codwise v. Field, 9 Johns. (N. Y.) 263. Compare Trigg v. Harris, 49 Mo. 176.

[26] Lincoln Sav. Bank v. Ewing, 12 Lea (Tenn.) 598; Campion v. Friedberg, 55 Ill. App. 450; Rother v. Monahan, 60 Minn. 186, 62 N. W. 263; Thompson v. McMillan, 89 Tenn. 110, 14 S. W. 439; Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. 308.

[27] Deland v. Hiett, 27 Cal. 611, 87 Am. Dec. 102; Weber v. Couch, 134 Mass. 26, 45 Am. Rep. 274; Garvey v. Jarvis, 54 Barb. (N. Y.) 179; McArthur v. Dane, 61 Ala. 539. A judgment debtor is not entitled to have the judgment satisfied on payment of the amount of the judgment, where the amount of the costs is not inserted, where he made no motion to require the prevailing party to have the costs taxed. Stakke v. Chapman, 13 S. D. 269, 83 N. W. 261. See Maxton v. Mount, 86 Ill. App. 187. But where the defendant is liable for nominal damages only, the payment by him of the costs may be considered a sufficient payment of the judgment. Boardman v. Marshalltown Grocery Co., 105 Iowa, 445, 75 N. W. 343.

[28] Beers v. Hendrickson, 45 N. Y. 665.

ment that the same shall discharge it in full, will operate, especially under equitable circumstances, as a discharge of the judgment.[29] Thus, in one of the cases cited it was said: "Whether the ancient rule, that a payment of a part is not a satisfaction of an entire demand, be in force or not, it seems to us that where the right of appeal from a judgment has not lapsed, and the debtor is in a condition and about to take such appeal, but at the instance of the creditor, and with money borrowed from third parties with the knowledge and at the request of the creditor, pays him a portion of the amount of the judgment under an agreement that it shall be in full, the entire judgment is satisfied." [30] And it is certain that payment of part of a judgment, together with an additional consideration, either in the shape of an article of value,[31] or of the doing or procuring some act which is a burden or inconvenience to the defendant and a possible benefit to the plaintiff,[32] is sufficient to support the latter's agreement to release the entire judgment. A defendant in a litigated case who has consented to a judgment for a certain sum agreed upon as fixing the real amount of the plaintiff's debt or damages, cannot satisfy the judgment by the payment of a smaller sum, on the ground that there was a prior or contemporaneous parol agreement that such smaller sum should be received in full satisfaction of the judgment.[33] An attorney has no authority, by virtue of his general retainer, to accept anything less than the full amount of the judgment, nor to bind his client by an agreement to compromise for any less sum.[34]

[29] Clay v. Hoysradt, 8 Kan. 74; Walrath v. Walrath, 27 Kan. 395; Harper v. Graham, 20 Ohio, 105; Case v. Hawkins, 53 Miss. 702; Reid v. Hibbard, 6 Wis. 175; Jackson v. Olmstead, 87 Ind. 92; Hendrick v. Thomas, 106 Pa. 327; Pinson v. Puckett, 35 S. C. 178, 14 S. E. 393; Thurmond v. Bank of the State of Georgia (Tex. Civ. App.) 27 S. W. 317.

[30] Clay v. Hoysradt, 8 Kan. 74.

[31] Neal v. Handley, 116 Ill. 418, 6 N. E. 45, 56 Am. Rep. 784.

[32] Booth v. Campbell, 15 Md. 569. Where a judgment debtor was financially embarrassed, and unable to pay the judgment, his payment of a portion, and giving of additional security for another portion, aggregating less than the whole, were a sufficient consideration for the satisfaction of the judgment. Brown v. Kern, 21 Wash. 211, 57 Pac. 798.

[33] Knight v. Cherry, 64 Mo. 513.

[34] Jones v. Ransom, 3 Ind. 327; Trumbull v. Nicholson, 27 Ill. 149; Garth-

§ 990. Evidence of Payment.

The payment of a judgment may be proved by parol evidence, by a separate written receipt, or by a receipt upon the records of the court.[35] And the return and receipts on the execution are also competent evidence of payment.[36] A party who claims to have paid a judgment, and offers in evidence a discharge by a person describing himself as assignee of the judgment, must prove the authority of such assignee.[37] In a suit to cancel a judgment on the ground that it has been paid, the judgment debtor has the burden of proving payment.[38] And on the hearing of a rule to show cause why satisfaction of a judgment should not be entered, conflicting evidence on the question of payment being offered, it is in the discretion of

waite v. Wentz, 19 La. Ann. 196; Jewett v. Wadleigh, 32 Me. 110; Beers v. Hendrickson, 45 N. Y. 665; Vail v. Conant, 15 Vt. 314; Smock v. Dade, 5 Rand. (Va.) 639, 16 Am. Dec. 780; Abbe v. Rood, 6 McLean, 107, Fed. Cas. No. 6; Maxfield v. Carr, 8 Kulp (Pa.) 214; Wood v. City of New York, 44 App. Div. 299, 60 N. Y. Supp. 759; Lewis v. Blue, 110 N. C. 420, 15 S. E. 196. See Whitesell v. Peck, 165 Pa. 571, 30 Atl. 933. Where the judgment debtor in good faith pays to the attorney of record of the judgment creditor an amount less than was due on the judgment in full satisfaction, the satisfaction will be vacated only on terms that plaintiff release defendant from the judgment to the extent of the payment made to the attorney. Faughnan v. City of Elizabeth, 58 N. J. Law, 309, 33 Atl. 212. Where a judgment creditor's attorney compromises a judgment, which he partially owns, without receiving payment therefor in cash, the judgment is satisfied to the extent of the attorney's interest. McMurray v. Marsh, 12 Colo. App. 95, 54 Pac. 852.

[35] Hollenbeck v. Stanberry, 38 Iowa, 325; Vestal v. Wicker, 108 N. C. 21, 12 S. E. 1037. Parol evidence is admissible to prove any matters arising subsequent to a judgment which in law or fact amount to payment. Fowler v. Smith, 153 Pa. 639, 25 Atl. 744; Barrett v. Wilkinson, 87 Va. 442, 12 S. E. 885; Peters v. Lawson, 66 Tex. 336, 17 S. W. 734. Plaintiff in a creditor's suit may testify that his judgment has never been satisfied, since the record is not the only means by which proof of payment of the judgment may be made. Whiteside v. Hoskins, 20 Mont. 361, 51 Pac. 739. Positive testimony that witness paid a certain sum on a judgment to the creditor's attorneys of record is competent. Shaffer v. McCrackin, 90 Iowa, 578, 58 N. W. 910, 48 Am. St. Rep. 465.

[36] Snider v. Greathouse, 16 Ark. 72, 63 Am. Dec. 54.

[37] Platt v. St. Clair's Heirs, Wright (Ohio) 526.

[38] Lewis v. Lewis, 31 Neb. 528, 48 N. W. 267.

the court, instead of discharging the rule and entertaining an application to open the judgment, to order the judgment opened and cause the issue of payment to be submitted to a jury.[39]

§ 991. Keeping Judgment Alive after Payment.

It is a general rule that a judgment once fully paid, and thereby satisfied and extinguished, cannot be kept alive by the agreement of the parties, to stand as a security for other liabilities or for future advances.[40] But in Pennsylvania it is said that "actual payment discharges a judgment at law, but not in equity, if justice require the parties in interest to be restrained from alleging it, or insisting on their legal rights."[41] And in that state, and some others, it is held that the parties to a judgment (no rights of third persons being involved) may agree to change the purposes for which the judgment is to be held as security, e. g., that when the judgment-debt is paid in full, it shall not be satisfied, but shall remain as security for another loan. No one but a lien-creditor whose rights would be affected can complain of such an agreement.[42] If a debtor pays his judgment-creditor a sum equal to the amount of the judgment, and thereupon causes the judgment to be assigned as a payment to another of his creditors, the transaction does not discharge the judgment, but the same continues valid in the hands of the assignee.[43] An entry upon the record of payment of the debt and interest, does not

[39] Hottenstein v. Haverly, 185 Pa. 305, 39 Atl. 946.

[40] Averill v. Loucks, 6 Barb. (N. Y.) 19; Truscott v. King, 6 N. Y. 147; Troup v. Wood, 4 Johns. Ch. (N. Y.) 228; Craft v. Merrill, 14 N. Y. 456; Winslow v. Clark, 2 Lans. (N. Y.) 380; Fowler v. Smith, 31 S. C. 398, 10 S. E. 93, 5 L. R. A. 721; Flagg v. Kirk, 20 D. C. 335; Bank of Warren County v. Kemble, 61 Mo. App. 215.

[41] Fleming v. Beaver, 2 Rawle, 128, 19 Am. Dec. 629; Milligan's Appeal, 104 Pa. 503.

[42] Peirce v. Black, 105 Pa. 342; Wood v. Currey, 49 Cal. 359. But see Thompson v. Sankey, 175 Pa. 594, 34 Atl. 1104.

[43] Howk v. Kimball, 2 Blackf. (Ind.) 309. But in Nebraska, it is said that when payment of a judgment has been made by one who is primarily liable, it operates as an absolute satisfaction, even though an assignment be made to a third person with the intention of keeping the judgment alive. Henry & Coatsworth Co. v. Halter, 38 Neb. 685, 79 N. W. 616; First Nat. Bank v. Gibson, 60 Neb. 767, 84 N. W. 259.

satisfy the judgment so far as to prevent further proceedings for the collection of costs.[44]

PART II. PRESUMPTION OF PAYMENT FROM LAPSE OF TIME.

§ 992. Common Law Presumption.

At common law, a judgment, after the lapse of twenty years, without any payment or process upon it, or any acknowledgment of it in the meantime as a subsisting debt, or any explanation of its so remaining, will be presumed in law to be paid.[45] But this presumption is not an absolute bar, like the statute of limitations, nor is it conclusive, but it may be rebutted by various circumstances showing non-payment.[46] If, however, there are no circumstances in the case to rebut the presumption, it is not the duty of the court to submit the question, as an open one, to the jury. Satisfaction of the judgment is a presumption of law upon the facts.[47] The same presumption is also established as a rule of law by statute in several of the states. But such statutes do not make the lapse of twenty years a bar to proceedings on the judgment, but merely create a rebuttable presumption of payment.[48] In estimating the time sufficient to raise a presumption that a judgment has been paid, the period during which the party was under disability from infancy must be deducted.[49]

[44] Altman v. Klingensmith, 6 Watts (Pa.) 445.

[45] Robinson's Adm'r v. Milby's Adm'r, 2 Houst. (Del.) 387; Bright's Adm'r v. Sexton, 18 Ind. 186; Hendricks v. Wallis, 7 Iowa, 224; Smith's Ex'r v. Miller, 14 Wend. (N. Y.) 188; Beekman v. Hamlin, 19 Or. 383, 24 Pac. 195, 10 L. R. A. 454, 20 Am. St. Rep. 827; Farmers' Bank v. Leonard, 4 Har. (Del.) 536; Burt v. Casey, 10 Ga. 178; Miller v. Smith's Ex'rs, 16 Wend. (N. Y.) 425; Sargent v. Hayne, Riley (S. C.) 293; Pratt v. McLure, 10 Rich. Eq. (S. C.) 301; Thayer v. Mowry, 36 Me. 287; Morrow v. Robinson, 4 Del. Ch. 521; Moore v. Carey, 1 Marv. (Del.) 401, 41 Atl. 75; Maxwell v. Devalinger, 2 Pennewill (Del.) 504, 47 Atl. 281; Tennessee v. Virgin, 36 Ga. 390; Willingham v. Long, 47 Ga. 545; Biddle v. Girard Nat. Bank, 109 Pa. 349; Tobin v. Meyers, 18 S. C. 324.

[46] Clark v. Clement, 33 N. H. 563. See also the cases cited above and those in the next section.

[47] Cope v. Humphreys, 14 Serg. & R. (Pa.) 15.

[48] Brewer v. Thomes, 28 Me. 81. See Code Civ. Proc. N. Y. § 376; Seaman v. Clarke, 60 App. Div. 416, 69 N. Y. Supp. 1002.

[49] McQueen v. Fletcher, 4 Rich. Eq. (S. C.) 152.

Regard must also be had to the character of the judgment. For the presumption is not, in the nature of things, applicable to all judgments alike. Thus, no presumption of satisfaction of a judgment for the possession of land, rendered in an action to recover it for the non-payment of rent reserved on a manorial lease in perpetuity, arises from the lapse of twenty years without its enforcement.[50]

§ 993. Evidence to Rebut Presumption.

In regard to the kind and degree of evidence necessary to rebut the presumption of payment from lapse of time, it is impossible to lay down precise rules. Almost any evidence, adapted to the circumstances of the case and tending directly or by implication to negative the fact of payment, will answer the purpose, if sufficiently strong to satisfy the court and jury. In one of the cases it is said: "Although the full period of twenty years had elapsed, the law would not conclude that the debt had been paid, if the presumption was rebutted by evidence, such as proof of the defendant's recent acknowledgment of the debt, or of payment of interest within twenty years, or of demand made within that time, or of suit brought and the writ returned non est inventus, or that, during part of the time, the plaintiff was an alien enemy and disabled to sue, or that the courts of justice were closed and the country in the tumult and confusion of war and revolution." [51] The presumption will be rebutted by proof that, within the twenty years, payments have been made on the judgment,[52] even where the payment is made by a surety without the knowledge of the principal.[53] But not by evidence that the plaintiff indorsed on the record, as a credit on the judgment, a sum which he owed to the defendant, unless it further appears that the parties had a settlement of their dealings, after the recovery of the judgment, and agreed that said sum should be credited on the judgment.[54] The

[50] Van Rensselaer v. Wright, 121 N. Y. 626, 25 N. E. 3.

[51] Woodruff v. Sanders, 15 Ark. 143; In re Walker, 107 N. C. 340, 12 S. E. 136; Day v. Crosby, 173 Mass. 433, 53 N. E. 880.

[52] Bissell v. Jaudon, 16 Ohio St. 498; Rowe's Adm'r v. Hardy's Adm'r, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811.

[53] Denny v. Eddy, 22 Pick. (Mass.) 533.

[54] Vaughan v. Marshall, 1 Houst. (Del.) 604.

presumption is also negatived by a written admission of the debt, or evidence of a clear and well-identified promise, intelligently made, within the twenty years.[55] But a mere acknowledgment that the debt has not been paid will not suffice, unless there is also a distinct promise to pay it.[56] If the collection of the judgment has been prevented by an injunction, this fact also will avail to repel the presumption of payment.[57] The poverty of the defendant, alone, is not sufficient to overcome the presumption, but proof of his positive inability to pay during the whole period will do so.[58] Evidence of his failure in business is admissible, but this is not sufficient without something to show the continued insolvency of the debtor.[59] The fact that a judgment was allowed to stand open for twenty-four years, when the creditor had under execution, and within his reach, property ample to pay the judgment, is not conclusive that it has been satisfied; for the indulgence may be explained.[60] Other cases dealing with the weight and sufficiency of evidence available for this purpose are collected in the note.[61]

§ 994. Lapse of Less than Twenty Years.

The fact that any number of years less than twenty have elapsed since the rendition of a judgment will not raise a presumption of law that it has been paid. But the lapse of a shorter period of time, when accompanied by persuasive circumstances, may be submitted to a jury as ground for a presumption of fact.[62] "Before the ex-

[55] Beekman v. Hamlin, 19 Or. 383, 24 Pac. 195, 10 L. R. A. 454, 20 Am. St. Rep. 827.

[56] Stover v. Duren, 3 Strob. (S. C.) 448, 51 Am. Dec. 634. Compare McNair v. Ingraham, 21 S. C. 70. See Smith v. Schoenberger, 176 Pa. 95, 34 Atl. 954.

[57] Hutsonpiller's Adm'r v. Stover's Adm'r, 12 Grat. (Va.) 579.

[58] Taylor v. Megargee, 2 Pa. 225; Knight v. Macomber, 55 Me. 132; Robinson's Adm'r v. Milby's Adm'r, 2 Houst. (Del.) 387; Waddell's Adm'r v. Elmendorf's Adm'r, 10 N. Y. 170. See Boyd v. Boyd, 9 Misc. Rep. 161, 29 N. Y. Supp. 7.

[59] Jackson v. Nason, 38 Me. 85.

[60] Johnson v. Tuttle, 9 N. J. Eq. 365.

[61] See Walker v. Robinson, 136 Mass. 280; Van Loon v. Smith, 103 Pa. 238; Boardman v. De Forrest, 5 Conn. 8; Mower v. Kip, 2 Edw. Ch. (N. Y.) 165; Burt v. Casey, 10 Ga. 179; Yarnell v. Moore, 3 Cold. (Tenn.) 173; Willaume v. Gorges, 1 Camp. 217.

[62] Hendricks v. Wallis, 7 Iowa, 224; Thayer v. Mowry, 36 Me. 287; Daby

piration of twenty years the law did not make the presumption [of payment of a judgment]; nevertheless the jury, upon an issue of payment, might infer the fact of payment from a lapse of time, short of twenty years, in combination with other circumstances in evidence, such as the settlement of an account in the intermediate time, or the obligor being poor and the obligee being independent, or the parties residing in the neighborhood of each other, without any demand being made, and other like circumstances,—the evidence to be more or less strong, in aid of the presumption from lapse of time, as the time is more or less short of twenty years." [63] In the state of Tennessee, it has been settled law from early times that if a judgment or decree is permitted to lie dormant for sixteen years, with no demand or payment of interest, and no attempt to enforce the collection, a presumption of its payment will arise.[64]

PART III. PAYMENT BY JOINT PARTY OR THIRD PERSON.

§ 995. Parties Jointly Liable.

It appears to be the general rule that payment of a judgment by one of two joint defendants operates as a satisfaction and extinguishment of the judgment, and the defendant paying cannot take an assignment of it, or be subrogated to the rights of the creditor as against his co-defendant, or keep the judgment alive in any manner or for any purpose.[65] But still, in some of the states, it is held

v. Ericsson, 45 N. Y. 786; Boyd v. Boyd, 9 Misc. Rep. 161, 29 N. Y. Supp. 7; Foster v. Hunter, 4 Rich. Eq. (S. C.) 16; Renwick v. Wheeler (C. C.) 48 Fed. 431; James' Ex'r v. Life, 92 Va. 702, 24 S. E. 275; Wherry v. McCammon, 12 Rich. Eq. (S. C.) 337, 91 Am. Dec. 240; Baker v. Stonebraker, 36 Mo. 338; Kinsler v. Holmes, 2 S. C. 483; Rector v. Morehouse, 17 Ark. 131; Murphy v. Philadelphia Trust Co., 103 Pa. 379; Van Loon v. Smith, Id. 238.

[63] Woodruff v. Sanders, 15 Ark. 143.

[64] Blackburn v. Squib, Peck, 64; McDaniel v. Goodall, 2 Cold. 391; Yarnell v. Moore, 3 Cold. 173; Husky v. Maples, 2 Cold. 25, 88 Am. Dec. 588; Leiper v. Erden, 5 Yerg. 97; Anderson v. Settle, 5 Sneed, 202.

[65] Montgomery v. Vickery, 110 Ind. 211, 11 N. E. 38; Morley v. Stevens, 47 How. Prac. (N. Y.) 228; Booth v. Farmers' & Mechanics' Bank, 74 N. Y. 228; Tompkins v. Fifth Nat. Bank, 53 Ill. 57; Porter v. Gile, 44 Vt. 520; Towe v. Felton, 52 N. C. 216; Weston v. Clark, 37 Mo. 568; Bones v. Aiken, 35 Iowa, 534; Preslar v. Stallworth, 37 Ala. 402; Hammatt v. Wyman, 9 Mass. 138; Worden v. Jones, 1 Kan. App. 501, 40 Pac. 1071; Dunn v. Bea-

that the defendant so paying is entitled to be subrogated to the rights of the plaintiff in the judgment, to the extent to which such payment was for the benefit, or on behalf of his co-defendant.[66] In one of the early cases on the subject we find the following language: "A payment by any one of two or more jointly or jointly and severally bound for the same debt, is payment by all, and any of the parties may take advantage of it and plead it to an action brought by a satisfied creditor, or in his name by the sureties. It is true that if a payment be not intended, but a purchase, there is a difference. But that can only be by a stranger, or by using the name of a stranger, to whom an assignment can be made when there is but a single security, and that one upon which all the parties are jointly liable. This is upon the score of intention, and because a plea of payment by a stranger is bad on demurrer. If the assignment of a joint security be taken by the surety himself, there is an extinguishment, notwithstanding the intention, because an assignment to one of his own debt is an absurdity. Where the securities are separate, as several bonds, or a several judgment upon a joint and several note, which is the case here, probably an assignment may be made to the surety himself, since he is no party to the judgment. But if that can be, clearly nothing but a plain intention, evinced by an assignment, to keep up the judgment, can have that effect."[67] Where a decree is rendered against several defendants, and a compromise made by the complainant with some, as to their portion of the debt, the other defendants are not released.[68]

Where a judgment is obtained by the holder of negotiable paper against the maker and the first and second indorsers, and the first indorser purchases and takes an assignment of the judgment from the holder, such purchase and assignment do not operate as an

man, 126 N. C. 764, 36 S. E. 174; National Security Bank v. Hunnewell, 124 Mass. 260; Shields v. Moore, 84 Ind. 440; Hinton v. Odenheimer, 57 N. C. 406; Sager v. Moy, 15 R. I. 528, 9 Atl. 847.

[66] Coffee v. Tevis, 17 Cal. 239. See, also, Brown v. White, 29 N. J. Law, 516; Durand v. Trusdell, 44 N. J. Law, 597; Huckaby v. Sasser, 69 Ga. 603; In re Wheeler's Estate, 1 Md. Ch. 80.

[67] Sherwood v. Collier, 14 N. C. 380, 24 Am. Dec. 264.

[68] Molyneaux v. Marsh, 1 Woods, 452, Fed. Cas. No. 9,703. See, also, Penn v. Edwards, 50 Ala. 63; Boykin v. Bule, 109 N. C. 501, 13 S. E. 879.

extinguishment of the judgment as against the maker, and the indorser, so purchasing the judgment, can wield it against the property of the maker.[69]

Where several judgments have been rendered against parties jointly and severally liable on the same obligation, and one of the judgments has been paid, such payment is a satisfaction of all the judgments, except as to costs; and when suits are still being prosecuted against some of the parties liable, the payment of such judgment may be pleaded in bar of the further maintenance of the pending actions.[70] So also, in actions of tort, where the plaintiff recovers separate judgments against the joint tort-feasors, the satisfaction of any one of the judgments will release the other defendants from liability.[71] But it has been held that where separate actions have been commenced against two joint wrong-doers, one of which has been prosecuted to judgment, a dismissal of the pending action upon payment of a sum intended to be in settlement of costs, and an acknowledgment of satisfaction, does not operate to satisfy the judgment, either wholly or pro tanto.[72]

§ 996. Payment by Surety.

Where a surety pays a judgment recovered against himself and his principal, he thereby satisfies it, and reduces himself to the situation of a simple contract creditor of the principal; but if he takes an assignment of the judgment to a stranger, and does not intend

[69] Corey v. White, 3 Barb. (N. Y.) 12; Eno v. Crooke, 10 N. Y. 66. Compare Bank of Salina v. Abbot, 3 Denio (N. Y.) 181; Topp v. Branch of Alabama Bank, 2 Swan (Tenn.) 184.

[70] First Nat. Bank v. Indianapolis Piano Manuf'g Co., 45 Ind. 5; Bank of State v. Mosely, 1 Strob. (S. C.) 414; Sherman v. Brett, 7 Wis. 139; Craft v. Merrill, 14 N. Y. 456.

[71] Shainwald v. Lewis (D. C.) 46 Fed. 839; Ashcraft v. Knoblock, 146 Ind. 169, 45 N. E. 69; Gross v. Pennsylvania, P. & B. R. Co., 65 Hun, 191, 20 N. Y. Supp. 28; Bryant v. Reed, 34 Neb. 720, 52 N. W. 694; Butler v. Ashworth, 110 Cal. 614, 43 Pac. 4. But in Kansas, it is said that a cause of action against several, founded on a tort, when reduced to judgment, becomes as to all a joint indebtedness, which may be discharged as to one, without releasing the others as to any unpaid balance. Missouri, K. & T. Ry. Co. v. Haber, 56 Kan. 717, 44 Pac. 619.

[72] Bell v. Perry, 43 Iowa, 368.

to satisfy it, the judgment will not be extinguished by the payment.[73] Where a judgment is joint, against two defendants, both are regarded as principals, unless by proof aliunde one is shown to be a surety, and where one of them pays the whole amount of the judgment, he is not therefore entitled to an execution, for use against his co-defendant, unless he himself has been judicially determined to be only a surety.[74] Where individual judgments are entered against the principals of two promissory notes in which each appears as surety for the other, and no appeal is taken from such judgments, and afterwards one of the debtors pays the judgment against himself, it will be presumed that the judgments are for separate debts, and the payment on the one judgment cannot be applied in satisfaction of the other.[75] Where, in an action against principal and surety on a title-bond, upon which they are severally as well as jointly liable, separate judgments against each are obtained, but in different amounts, the judgment-creditor may insist upon satisfaction of either; but if he accepts the amount of the smaller judgment against the surety and enters it satisfied in full, the debt itself is thereby extinguished, and all recourse on the larger judgment

[73] Briley v. Sugg, 21 N. C. 366, 30 Am. Dec. 172; Lyon v. Bolling, 9 Ala. 463, 44 Am. Dec. 444; Barringer v. Boyden, 52 N. C. 187; Hays v. Ward, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; Dempsey v. Bush, 18 Ohio St. 376; Peters v. McWilliams, 36 Ohio St. 155; Cottrell's Appeal, 23 Pa. 294; McClung v. Beirne, 10 Leigh (Va.) 394, 34 Am. Dec. 739; Fleming v. Beaver, 2 Rawle (Pa.) 128, 19 Am. Dec. 629; Fulton v. Harrington, 7 Houst. (Del.) 182, 30 Atl. 856; State v. Hearn, 109 N. C. 150, 13 S. E. 895; Storz v. Boyce, 34 Misc. Rep. 279, 69 N. Y. Supp. 612; Wilmer v. Brice, 91 Md. 71, 46 Atl. 322; Smith v. Lang, 2 Tex. Civ. App. 683, 22 S. W. 197; Frankel v. Stern, 50 Ill. App. 54; Cleiman v. Murphy, 34 Ill. App. 633; Wyatt v. Fromme, 70 Mo. App. 613. Compare Murray v. Meade, 5 Wash. St. 693, 32 Pac. 780. But a deposit of money, made by a guarantor of notes on which judgment has been taken, intended as a security for the ultimate payment of the debt, and which it was stipulated should not operate as a payment of the debt, cannot be regarded as a payment of the judgment. Steffins v. Gurney, 61 Kan. 292, 59 Pac. 725. And where the administrator of a surety became the assignee of a judgment against his intestate and the latter's principal, though he had assets in his hands sufficient to pay the judgment, it was held that the judgment was not satisfied by the assignment, but that he could enforce it against the principal. King v. Aughtry, 3 Strob. Eq. (S. C.) 149.

[74] Laval v. Rowley, 17 Ind. 36.

[75] Caldwell v. Martin, 29 S. C. 22, 6 S. E. 857.

against the principal debtor is gone, although, in the entry of satisfaction, the creditor expressly reserves "all rights" against the principal debtor on the judgment against him. The attempted reservation under such circumstances is inoperative and void.[76]

§ 997. Release of Garnishee by Payment of Principal Judgment.

A judgment against a garnishee is ancillary to and dependent upon the judgment against the principal debtor. When the latter is paid off and satisfied, the former is functus officio; the purpose for which it was entered up has been accomplished in another way, and it ceases to be a valid process or obligation for any purpose whatever, except perhaps for costs.[77]

§ 998. Payment by Sheriff.

According to the rule prevailing in New York, and in some other states, if a sheriff who has made himself liable for negligence in failing to collect money under a judgment, pays the amount of the judgment, either voluntarily or under legal compulsion, the judgment is thereby extinguished. He cannot, by taking an assignment of the judgment, succeed to the rights of the creditor, or keep it alive for the purpose of re-imbursing himself by recourse to the judgment-debtor.[78] But there are also numerous authorities in support of the proposition that the sheriff, on paying off the debt in his own exoneration, may take an assignment of the judgment in his own name, or to a third person in trust for himself, and then proceed to issue an alias execution thereon.[79] But most of the cases make a distinction

[76] Cox v. Smith, 10 Or. 418.

[77] Hammett v. Morris, 55 Ga. 644.

[78] Bigelow v. Provost, 5 Hill, 566; Jones v. Wilson, 3 Johns. 434; Menderback v. Hopkins, 8 Johns. 436; Beach v. Vandenburgh, 10 Johns. 361; Carpenter v. Stilwell, 11 N. Y. 61; Sherman v. Boyce, 15 Johns. 443; Reed v. Pruyn, 7 Johns. 426, 5 Am. Dec. 287; Whittier v. Heminway, 22 Me. 238, 38 Am. Dec. 309; Simpson v. Mercer, 144 Mass. 413, 11 N. E. 720; Boren v. McGehee, 6 Port. (Ala.) 432, 31 Am. Dec. 695.

[79] Heilig v. Lemly, 74 N. C. 250, 21 Am. Rep. 489; Allen v. Holden, 9 Mass. 133, 6 Am. Dec. 46; Dunn v. Snell, 15 Mass. 481; Cheever v. Mirrick, 2 N. H. 376; Rhea v. Preston, 75 Va. 757; Lintz v. Thompson, 1 Head (Tenn.) 456, 73 Am. Dec. 182.

founded on the circumstances under which the officer makes the payment. It is held that if he voluntarily pays the full amount of the judgment to the plaintiff, such payment will extinguish both the execution and judgment, and the officer cannot take out an alias execution for his own benefit.[80] But if the payment in such case is compelled by the judgment of a court of competent jurisdiction against the officer, this operates as an implied transfer of the judgment and execution to him.[81]

§ 999. Payment by Stranger.

When the amount due upon a judgment is paid wholly or in part by one who is not a party to it nor bound by it, the judgment is extinguished or not according to the intention of the party paying. If such is the design and agreement the judgment may be kept alive for his benefit, and he will succeed to the rights of the judgment creditor, and be entitled to enforce it against the debtor.[82] Thus, the purchase by a partnership of a judgment against one of its members and other parties, the assignment being taken in the name of a member not a judgment-defendant, is not a satisfaction of the judgment.[83] But where a judgment-debtor furnishes money to a third person to buy up the judgment at a discount, and he does so,

[80] Lintz v. Thompson, 1 Head (Tenn.) 456, 73 Am. Dec. 182; Arnett v. Cloud, 2 Ga. 53; Garth v. Campbell, 10 Mo. 154; Hall v. Taylor, 18 W. Va. 544.

[81] Lintz v. Thompson, 1 Head (Tenn.) 456, 73 Am. Dec. 182; Allen v. Holden, 9 Mass. 133, 6 Am. Dec. 46; Chester v. Plaistow, 43 N. H. 545; Smith v. Alexander, 4 Sneed (Tenn.) 482.

[82] Harbeck v. Vanderbilt, 20 N. Y. 395; Rollins v. Thompson, 21 Miss. 522; Null v. Moore, 32 N. C. 324; Marshall v. Moore, 36 Ill. 321; Sydam v. Cannon, 1 Houst. (Del.) 431. Compare Riffle's Appeal, 3 Brewst. (Pa.) 94. When a person pays a judgment creditor the amount of his judgment against another, and takes an assignment of it, the judgment creditor is satisfied, but the judgment is not. People v. Weimer, 94 Ill. App. 112. But the payment of part of a judgment by a person other than the debtor is a sufficient consideration for an agreement by the creditor to cancel the judgment. Smith v. Gould, 84 Hun, 325, 32 N. Y. Supp. 373. The owner of a judgment, however, is under no obligation to accept payment from any volunteer. For example, a judgment creditor of an insolvent is not bound to assign his judgment to junior creditors of the insolvent on their offering to pay the judgment debt. James v. Markham, 128 N. C. 380, 38 S. E. 917.

[83] Owensby v. Platt, 3 Ind. 459.

the creditor not knowing the facts, it amounts only to a part payment.[84] Some of the authorities rule that there must be an agreement to keep the judgment alive, or else the payment by a volunteer will extinguish it; that unless he pays in the character of a surety, or to protect his own interests, he will not be subrogated to the rights of the creditor as a matter of course, but only in pursuance of a specific agreement or understanding.[85] But we conceive that the true criterion must be sought in the intention with which the payment is made. However this may be, whether an agreement must be shown or merely an intention to put himself in the place of the creditor, it is not necessary that either should be evidenced by a formal and valid assignment of the judgment. It is true an assignment would be conclusive proof, but its importance rests in its character as evidence, rather than in its power to effect a legal transfer of rights. Thus the court in New York declares that the taking of an assignment, whether valid or void, affords, under all circumstances, unequivocal evidence of an intention not to satisfy the judgment.[86] And the supreme court of Pennsylvania holds that where a third party pays the amount of a judgment, with the intention of holding it for his own use, although no transfer is taken, it is not a payment and satisfaction of the judgment.[87] But on the other hand, where a third party advances to the sheriff the amount due on a judgment, taking at the same time a mortgage from the defendant as security for such advance, it must be presumed that such party intended to extinguish the judgment and rely exclusively on the mortgage.[88] In a case in Michigan, it appeared that the attorney for the defendant paid a certain judgment, agreeing with the plaintiff's attorney that if the defendant refused to reimburse him, the payment was to be refunded, and the satisfaction of the judgment returned. The plaintiff supposed that his judgment had been satisfied and knew nothing as to where the money to pay it had come

[84] Shaw v. Clark, 6 Vt. 507, 27 Am. Dec. 578.

[85] Sandford v. McLean, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; Head v. Gervais, Walk. (Miss.) 431, 12 Am. Dec. 577.

[86] Harbeck v. Vanderbilt, 20 N. Y. 395.

[87] Campbell's Appeal, 29 Pa. 401, 72 Am. Dec. 641.

[88] Phillips v. Behn, 19 Ga. 298.

from. The defendant's attorney took no assignment of the judgment to protect himself. Under these circumstances, it was held that the judgment must be considered satisfied.[89] If the debtor joins with a stranger in paying off the judgment, taking an assignment to his attorney, the assignment will be valid as to the stranger, though void as to the debtor.[90]

PART IV. SET-OFF OF JUDGMENT AGAINST JUDGMENT.

§ 1000. Power to Order Set-Off of Judgments.

The courts, both of law and equity, have power to order one judgment to be set off against another, on proper application made, when the two judgments are between the same parties, and when equity and justice will be promoted by such action, thereby extinguishing both judgments if they are equal in amount, or, if they are unequal, satisfying the smaller judgment in full and the larger pro tanto.[91] This power was one which pertained originally only to the courts of equity. But it is now everywhere considered entirely competent for the law courts, in the exercise of their legitimate and incidental powers, to order the set-off of mutual judgments under proper circumstances.[92] "This practice does not rest upon any statute, but upon the general jurisdiction of courts over the suitors in them. It is an equitable jurisdiction frequently exercised."[93] But cases some-

[89] Rogers v. Welte, 61 Mich. 258, 28 N. W. 86.

[90] Harbeck v. Vanderbilt, 20 N. Y. 395.

[91] United States v. Griswold (D. C.) 30 Fed. 604; Sowles v. Witters (C. C.) 40 Fed. 413; Skrine v. Simmons, 36 Ga. 402, 91 Am. Dec. 771; Leavenson v. Lafontane, 3 Kan. 523; Peirce v. Bent, 69 Me. 381; Matthews v. Russell, 17 Pa. Co. Ct. R. 590; Schnitker v. Schnitker, 109 Iowa, 349, 80 N. W. 403; Zinn v. Dawson, 47 W. Va. 45, 34 S. E. 784, 81 Am. St. Rep. 772; Brown v. Warren, 43 N. H. 430; Hendrickson v. Brown, 39 N. J. Law, 239; Quick v. Durham, 115 Ind. 302, 16 N. E. 601; Ames v. Bates, 119 Mass. 397; Simson v. Hart, 14 Johns. (N. Y.) 63.

[92] Scott v. Rivers, 1 Stew. & P. (Ala.) 24, 21 Am. Dec. 646; Davidson v. Geoghagan, 3 Bibb (Ky.) 233; Palmateer v. Meredith, 4 J. J. Marsh. (Ky.) 74; Dutton v. Mason (Tex. Civ. App.) 52 S. W. 651.

[93] Chandler v. Drew, 6 N. H. 469, 26 Am. Dec. 704; Temple v. Scott, 3 Minn. 419 (Gil. 306). In several of the states, the set-off of mutual judgments is now authorized by statute. See Code Iowa, § 4040; Rev. St. Mo. 1889, § 8168; Civ. Code Ky. § 377; Rev. Codes N. D. § 5499. But the jurisdiction

times arise where the rights of the parties and the questions involved are too complicated to admit of being adjusted except in equity, and in such cases a court of law will not order the set-off.[94] And in general, an application to set off one judgment against another is addressed entirely to the discretion of the court, and hence, where the set-off might legally be made, but it is apparent that injustice would result, the motion will be refused.[95] "When a set-off is not authorized by statute, and when it would deprive a party of any of his legal rights, there can be no doubt that he would be entitled to have them protected by a bill of exceptions."[96] No exception lies to the refusal of the court, in the exercise of its discretion, to allow a set-off of one judgment against another, in cases where a set-off is not a matter of right under the statute law.[97] To authorize the set-off, it is necessary that the subject-matter should be clear and indisputable and conclusive upon the party, and that it should have passed the ordeal of a judicial examination in a case where the court had jurisdiction.[98] Where a plaintiff seeks to have a judgment obtained

conferred by statute upon courts of law to set off judgments against judgments does not divest courts of equity of jurisdiction in the same cases. Whitehead v. Jessup, 7 Colo. App. 460, 43 Pac. 1042.

[94] Story v. Patten, 3 Wend. (N. Y.) 331.

[95] Simson v. Hart, 14 Johns. (N. Y.) 63; Hendrickson v. Brown, 39 N. J. Law, 239; Tolbert v. Harrison, 1 Bailey (S. C.) 599; Williams v. Evans, 2 McCord (S. C.) 203; Ex parte Wells, 43 S. C. 477, 21 S. E. 334; Conable v. Bucklin, 2 Aikens (Vt.) 221; Baker v. Hoag, 6 How. Prac. (N. Y.) 201; Davidson v. Geoghagan, 3 Bibb (Ky.) 233; Smith v. Lowden, 1 Sandf. (N. Y.) 696; Makepeace v. Coates, 8 Mass. 451; Colquitt v. Bonner, 2 Ga. 155; Meador v. Rhyne, 11 Rich. Law (S. C.) 631; Low v. Duncan, 3 Strob. (S. C.) 195; Temple v. Scott, 3 Minn. 419 (Gil. 306); Herman v. Miller, 17 Kan. 328; Lundberg v. Davidson, 68 Minn. 328, 72 N. W. 71; Schuler v. Collins, 63 Kan. 372, 65 Pac. 662. The right of setting off judgments is permitted only where it will infringe on no other right of equal grade; and a debtor's exemption right is treated as one of equal grade. Hence, where the personal property of one debtor, including the judgment owned by him against his creditor, is less in value than the amount allowed him by the exemption laws, no set-off of the judgments will be allowed. Gieseke v. Schrakamp, 6 Ohio N. P. 299; Cleveland v. McCanna, 7 N. D. 455, 75 N. W. 908, 41 L. R. A. 852, 66 Am. St. Rep. 670.

[96] Bartlett v. Pearson, 29 Me. 9.

[97] Chipman v. Fowle, 130 Mass. 352; Burns v. Thornburgh, 3 Watts (Pa.) 78.

[98] Harris v. Palmer, 5 Barb. (N. Y.) 105.

by him set off against a judgment in favor of the defendant, he is seeking to recover on his judgment, within the meaning of a statute of limitations.[99]

§ 1001. Judgments of Different Courts may be Set Off.

It was at one time held that if two judgments existed in different courts, neither of those courts had power to order the judgments to be set off, but recourse must be had to equity. In such a case it was once observed: "It is true both these judgments are legal demands. Had they been recovered in the same court, they might have been set off at law under the equitable power of the court over its own judgments. But being recovered in different courts, there is no remedy but in equity, and yet there is an equitable right for which relief ought to be given."[100] But the accepted doctrine now is that if the party seeking the set-off moves for it in the court where the judgment against himself subsists, that court has power to order the judgment of any other court to be set off against its own judgment.[101] Thus, a judgment of a federal court may be set off against a judgment of a court of the state in which it sits.[102] A justice's judgment may be set off against the judgment of a court of record, if the time for appeal has expired.[103] And a judgment

[99] Dieffenbach v. Roch, 112 N. Y. 621, 20 N. E. 560, 2 L. R. A. 829. See Clark v. Story, 29 Barb. (N. Y.) 295.

[100] Webster v. McDaniel, 2 Del. Ch. 297. See, also, Buckmaster v. Grundy, 3 Gilman (Ill.) 626.

[101] Bloomstock v. Duncan, 2 McCord (S. C.) 318, 13 Am. Dec. 728; People v. New York Common Pleas, 13 Wend. (N. Y.) 649, 28 Am. Dec. 495; Simpson v. Hart, 1 Johns. Ch. (N. Y.) 91; Ewen v. Terry, 8 Cow. (N. Y.) 126; Rix v. Nevius, 26 Vt. 384; Wright v. Mooney, 28 N. C. 22; Hendrickson v. Brown, 39 N. J. Law, 239; Best v. Lawson, 1 Miles (Pa.) 11; State Bank at Trenton v. Coxe, 8 N. J. Law, 172, 14 Am. Dec. 417; Howe v. Klein, 89 Me. 376, 36 Atl. 620; Welsher v. Libby, McNeill & Libby, 107 Wis. 47, 82 N. W. 693. It is even immaterial that the judgment sought to be set off was rendered in another state. Phillips v. Mackay, 54 N. J. Law, 319, 23 Atl. 941.

[102] Schautz v. Kearney, 47 N. J. Law, 56.

[103] State Bank at Trenton v. Coxe, 8 N. J. Law, 172, 14 Am. Dec. 417; Robinson v. Kunkleman, 117 Mich. 193, 75 N. W. 451. But in an action before a justice of the peace, the defendant cannot set off a judgment recovered by him against the plaintiff, before another justice, which had been removed into the supreme court by certiorari. For, it was said, "he was not entitled

recovered before one justice can be ascertained and applied by another in satisfaction of a counterclaim recovered before him by the other party.[104] And in Tennessee it is also held that the supreme court may set off two of its own judgments in a proper case.[105]

§ 1002. Where the Motion should be Made.

When judgments obtained in different courts are to be set off, the party making the application must move in the court in which the judgment against him was recovered, because that is the court which has control over that judgment, and so far as concerns the judgment in his favor, he always has the power to credit or satisfy it.[106]

§ 1003. Moving Party must be Real Owner of Judgment.

To enable a person to procure the setting off of one judgment against another on motion, he must be the absolute owner of the judgment in his own right.[107] And a party will not be allowed to set off a judgment of which another is the equitable owner, where the fact is known to him when making the motion.[108] But it is also held that the use-plaintiff—one to whose use a judgment has been obtained in the name of another—has an equitable right to use the judgment by way of set-off.[109] And so also has one who acquired the

to execution on the judgment, without giving satisfactory security to restore the debt or damages in case the judgment should be reversed," and he should not be permitted to have the fruits of his judgment indirectly, by setting it off. Willard v. Fox, 18 Johns. (N. Y.) 497.

[104] McEwen v. Bigelow, 40 Mich. 215.

[105] Sneed v. Sneed, 14 Lea, 13.

[106] Russell v. Conway, 11 Cal. 93; Cooke v. Smith, 7 Hill (N. Y.) 186; Hicks v. Ross, 11 Barb. (N. Y.) 481; Wright v. Cobleigh, 23 N. H. 32; Taylor v. Williams, 14 Wis. 155; Weisner v. Libby, McNeill & Libby, 107 Wis. 47, 82 N. W. 693. See Sholle v. Pino, 9 N. M. 393, 54 Pac. 335.

[107] Mason v. Knowlson, 1 Hill (N. Y.) 218; Turner v. Satterlee, 7 Cow. (N. Y.) 480; Lee v. Lee, 31 Ga. 26, 76 Am. Dec. 681. A judgment for costs belongs to the attorney of the judgment creditor, and the judgment debtor cannot set off the same with a judgment recovered by him against such judgment creditor in a different action in another court. Jaeger v. Koenig, 33 Misc. Rep. 82, 67 N. Y. Supp. 172.

[108] Meador v. Rhyne, 11 Rich. Law (S. C.) 631.

[109] Norwood v. Norwood, 4 Har. & J. (Md.) 112.

judgment by assignment before the bringing of the action in which the judgment against himself was rendered.[110] But a judgment purchased by a party with a view to set it off, and upon condition that if he failed to obtain the set-off on motion, the assignment should be void and the assignor should pay the costs of the motion, cannot be set off.[111]

§ 1004. Mutuality of Parties Required.

In order that one judgment may properly be set off against another, it is necessary that there should be mutuality of parties.[112] For otherwise the transaction is sure to involve injury to the rights of some person concerned. For instance, where, in an action brought by A. against B. and C., to recover a debt due from them to A., the defendants pleaded the set-off of a judgment recovered by B. and his wife against A. and D., it was held that the plea was insufficient.[113] But still there may be cases in which a set-off would be equitable, although the parties to the two judgments are not identical, and in such cases it will not be refused.[114] Thus, a judgment against two persons jointly, where each is liable for the whole amount, may be set off against a judgment held by one of them singly as plaintiff.[115] And so where two judgments are recovered, one in favor of A. against B. and his sureties, and the other in favor of B. individually against A., the court, on motion of B., will set off the one against the other.[116] A judgment recovered by a woman while sole against A. may be set off against a judgment recovered by A. against her and her husband personally, for a devastavit com-

[110] Sexton v. Gee, 1 Hill (S. C.) 378.

[111] Miller v. Gilman, 7 Cow. (N. Y.) 469. But see, per contra, McBrayer v. Dean, 100 Ky. 398, 38 S. W. 508.

[112] Howe Mach. Co. v. Hickox, 106 Ill. 461; Patterson v. Ward, 8 N. D. 87, 76 N. W. 1046; Richmond v. Bloch, 38 Or. 317, 60 Pac. 388.

[113] Atkins v. Churchill, 19 Conn. 394; Holmes v. Robinson, 4 Ohio, 90.

[114] Colquitt v. Bonner, 2 Ga. 155; Hobbs v. Duff, 23 Cal. 596.

[115] Hutchins v. Riddle, 12 N. H. 464; Simson v. Hart, 14 Johns. (N. Y.) 63; Allen v. Hall, 5 Metc. (Mass.) 263; Hunt v. Conrad, 47 Minn. 557, 50 N. W. 614, 14 L. R. A. 512.

[116] Prince v. Fuller, 34 Me. 122; Bennett v. Hanley, 91 Mich. 143, 51 N. W. 885.

mitted by her as administratrix.[117] In an early Pennsylvania case it appeared that D. procured a policy of insurance to be made on a vessel for himself and others concerned in the same, and on a loss his executors recovered judgment against the underwriter, B., who had before obtained judgment against D. It was held that B. was entitled to set off this judgment, although it should appear that O. owned half of the vessel.[118] But unless the joint plaintiffs or joint defendants in the one judgment stand in some such relation as those just mentioned, it cannot be set off against a debt due to one of them, except on proof that the other is insolvent.[119] A judgment in favor of A. against B. individually, and a judgment in favor of a co-partnership consisting of B. and C., against A., are not mutual debts, and one cannot be set off against the other.[120]

It is well settled that the right to a set-off cannot be defeated by an assignment of one of the judgments made fraudulently for the very purpose of avoiding it.[121] But when the assignment was made in good faith and for value, and without any such purpose, it is doubtful whether the right of set-off is not lost. Some of the authorities hold that the mutuality which is necessary to the exercise of this power is destroyed by such an assignment. Others contend that the equity to a set-off is prior to the rights of the assignee, who takes the judgment subject to all equities between the original parties, and must be preferred. The subject has been discussed in an earlier chapter.[122]

[117] Rutherford v. Crabb, 5 Yerg. (Tenn.) 112.

[118] Darrah's Ex'rs v. Bayard, 3 Yeates, 152.

[119] Phelps v. Reeder, 39 Ill. 172; Windecker v. Mutual Life Ins. Co., 12 App. Div. 73, 43 N. Y. Supp. 358; Simmons v. Shaw, 172 Mass. 516, 52 N. E. 1087.

[120] Francis v. Rand, 7 Conn. 221. But compare Jeffries v. Evans, 6 B. Mon. (Ky.) 119, 43 Am. Dec. 158.

[121] Morris v. Hollis, 2 Har. (Del.) 4; Hurst v. Sheets, 14 Iowa, 322; Russell v. Conway, 11 Cal. 93.

[122] Supra, § 954. And see Wright v. Cobleigh, 23 N. H. 32; Graves v. Woodbury, 4 Hill (N. Y.) 559, 40 Am. Dec. 296; Makepeace v. Coates, 8 Mass. 451.

§ 1005. Requisites of Judgments to be Set Off.

In order that a judgment should be available as a set-off, it is necessary that it should be a valid and subsisting obligation and final in its nature.[123] Hence a judgment upon which an appeal is pending cannot be set off against another judgment,[124] nor can one which appears by the record to be satisfied, although it has not in fact been paid.[125] But the assignee of a dormant judgment against one who is insolvent may bring a suit to have it revived and set off against a judgment which has since been recovered against him by the other party, and which the latter is about to enforce.[126] A judgment for costs for a defendant may be set off against the judgment recovered by the plaintiff;[127] but not so as to divest the lien of the attorney

[123] A judgment not in existence when the action was commenced cannot be pleaded as a set-off. Spencer v. Johnston, 58 Neb. 44, 78 N. W. 482. Nor can one judgment be set off against another until both have been entered of record. Rupp v. Swartz, 3 Lack. Jur. (Pa.) 125. A final order allowing a receiver's account, and directing payment of a certain sum to one who rendered services to the receiver, is not a judgment, within the meaning of a statute allowing the set-off of mutual judgments. Patterson v. Ward, 8 N. D. 87, 76 N. W. 1046. In Pennsylvania, it is stated to be the general rule that judgments may be set off against each other whenever executions issued upon them could be legally set off, one against the other, by the officer having them in his hands for service. Matthews v. Russell, 17 Pa. Co. Ct. R. 590.

[124] De Figaniere v. Young, 2 Rob. (N. Y.) 670; De Camp v. Thomson, 22 Misc. Rep. 385, 50 N. Y. Supp. 454; Same v. Thompson, 31 App. Div. 634, 54 N. Y. Supp. 1098; Yarborough v. Fitzpatrick (Ky.) 51 S. W. 172; Gemmell v. Hueben, 71 Mo. App. 291; Zerbe v. Missouri, K. & T. Ry. Co., 80 Mo. App. 414; Spencer v. Johnston, 58 Neb. 44, 78 N. W. 482. But in some states, it is thought that the pendency of an appeal from one of the judgments will not warrant the court in refusing the set-off, though it should retain the motion until the determination of the appeal. Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786; Irvine v. Myers, 6 Minn. 562 (Gil. 398); Gaddis v. Leeson, 55 Ill. 522. Of course a judgment which was annulled on appeal cannot be set off. Magarity v. Succop's Adm'r, 90 Va. 561, 19 S. E. 260. But it is immaterial that the time for appealing from the judgment has not yet expired, if no appeal has actually been taken. Haskins v. Jordan, 123 Cal. 157, 55 Pac. 786.

[125] Smith v. Briggs, 9 Barb. (N. Y.) 252.

[126] Simpson v. Huston, 14 Tex. 476.

[127] Hurd v. Fogg, 22 N. H. 98; Zerbe v. Missouri, K. & T. Ry. Co., 80 Mo. App. 414; Welsher v. Libby, McNeil & Libby, 107 Wis. 47, 82 N. W. 693. Compare Gilson v. Fryatt, 2 Sandf. (N. Y.) 638; Howell v. Withers, 11 Pa. Co. Ct. R. 630.

for costs in the first-mentioned judgment.[128] A judgment may be set off before a jury against a demand not yet ascertained by judgment.[129] And where there are two actions in the same court between the same parties, it is within the discretion of the court to withhold judgment in one action until the defendant, as plaintiff in the other suit, using due diligence, shall obtain his judgment for damages, after which one judgment may be set off against the other.[130] A proceeding by the debtor of a decedent to set off a judgment obtained by him against the decedent, against one obtained by the administrator on the debt due the estate, is not affected by the insolvency of the estate, such judgment not really constituting assets in the hands of the administrator.[131] It is no objection to the set-off of mutual judgments that one was recovered upon a debt or contract and the other upon a claim in tort.[132] So also, where a claim for usury against a bank has been reduced to judgment, it may be set off against a judgment on the note or other obligation on which the usurious interest was paid.[133] And a judgment for damages for breach of a covenant of warranty in the conveyance of property may be allowed in reduction of the mortgage debt for such conveyance.[134] Again, one judgment may be set off against another, although the latter was entered on a note containing a waiver of homestead.[135]

[128] Nicoll v. Nicoll, 2 Edw. Ch. (N. Y.) 574; Dunkin v. Vandenbergh, 1 Paige (N. Y.) 622; Ainslie v. Boynton, 2 Barb. (N. Y.) 258; Winterson v. Hitchings, 38 N. Y. Supp. 171; Higgins v. Dunkleberger, 23 Pa. Co. Ct. R. 291; Morton v. Urquhart, 79 Minn. 390, 82 N. W. 653. See Ocean Ins. Co. v. Rider, 22 Pick. (Mass.) 210. Compare Smith v. Evans, 110 Ga. 536, 35 S. E. 633. Proceedings for setting off judgments cannot be defeated by subsequent notice by the attorney of one of the judgment creditors of his claim of lien. Sweeney v. Bailey, 7 S. D. 404, 64 N. W. 188.

[129] Metzgar v. Metzgar, 1 Rawle (Pa.) 227; Central Appalachian Co. v. Buchanan, 33 C. C. A. 598, 90 Fed. 454. Compare Irvin v. Wright, 1 Scam. (Ill.) 135; Faulconer v. Stinson, 44 W. Va. 546, 29 S. E. 1011.

[130] New Haven Copper Co. v. Brown, 46 Me. 418.

[131] Quick v. Durham, 115 Ind. 302, 16 N. E. 601.

[132] Langston v. Roby, 68 Ga. 406; Pasek v. Vockroth, 13 Pa. Co. Ct. R. 593. But compare McCormick v. Alexander, 3 Pa. Dist. R. 149.

[133] Lloyd v. First Nat. Bank, 5 Kan. App. 512, 47 Pac. 575; Barbour v. National Exchange Bank, 50 Ohio St. 90, 33 N. E. 542, 20 L. R. A. 192.

[134] Harrington v. Bean, 94 Me. 208, 47 Atl. 147.

[135] Riehl v. Vockroth, 10 Pa. Co. Ct. R. 657.

PART V. SATISFACTION BY PROCEEDINGS ON FINAL PROCESS.

§ 1006. Levy on Real Estate.

The mere levy of an execution upon real estate of the judgment-debtor does not amount even prima facie to a satisfaction of the judgment, for it does not interfere with the title or possession of the debtor.[136] "A levy upon real estate constitutes no satisfaction of an execution until consummated by sale. Before that period there is no change either of property or possession, and no reason to hold the levy to be a satisfaction."[137] But a return of "land delivered" on an elegit is a legal satisfaction of the judgment.[138] And so where a judgment-creditor makes a valid levy of his execution on land in which the debtor has an estate for his own life, and the debtor's interest in such land and its income are set off to such creditor at a yearly value, to continue for a term of years "should the debtor so long live," in full satisfaction of the execution, the judgment-debt is satisfied by such levy, although the debtor dies before the expiration of the term of years for which the land was set off.[139] And a judgment is satisfied when, under proceedings ordered by the proper court, the lands of the defendant are seized, sold, and conveyed by the sheriff to the plaintiff, he bidding for them the amount of the judgment with the interest and costs.[140]

136 Shepard v. Rowe, 14 Wend. (N. Y.) 260; Taylor v. Ranney, 4 Hill (N. Y.) 621; Patterson v. Swan, 9 Serg. & R. (Pa.) 16; Deloach v. Myrick, 6 Ga. 410; Foster v. Rutherford, 20 Ga. 676; Overby v. Hart, 68 Ga. 493; Fry v. Branch Bank, 16 Ala. 282; Beazley v. Prentiss, 13 Smedes & M. (Miss.) 97; Peale v. Bolton, 24 Miss. 630; White v. Graves, 15 Tex. 183; Boyd v. Mann, 9 Baxt. (Tenn.) 349; Hogshead v. Carruth, 5 Yerg. (Tenn.) 227; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338; Reynolds v. Rogers' Ex'rs, 5 Ohio, 169; Gregory v. Stark, 3 Scam. (Ill.) 612; Gold v. Johnson, 59 Ill. 62; Spafford v. Beach, 2 Doug. (Mich.) 150; Davidson v. Gaston, 16 Minn. 230 (Gil. 202); Wood v. Conrad, 2 S. D. 405, 50 N. W. 903; Chandler v. Furbish, 8 Me. 408; Tarbell v. Downer, 20 Vt. 330; New Zealand Ins. Co. v. Maaz, 13 Colo. App. 493, 59 Pac. 213. Compare Anthony v. Humphries, 9 Ark. 176.

137 Beazley v. Prentiss, 13 Smedes & M. (Miss.) 97.

138 Hinesly v. Hunn's Adm'r, 5 Har. (Del.) 236.

139 Thomas v. Platts, 43 N. H. 629.

140 Walker v. Powers, 104 U. S. 245, 26 L. Ed. 729; Hanna v. Savage, 21 Wash. 555, 58 Pac. 1069; Gonce v. McCoy, 101 Tenn. 587, 49 S. W. 754, 70 Am. St. Rep. 714.

§ 1007. Levy on Personalty.

It was the doctrine of the common law, and has been quite generally held in this country, that a levy of execution upon sufficient personal property of the judgment-debtor to pay the judgment operates per se as a satisfaction and extinguishment of the judgment.[141] This doctrine proceeds upon the principle that after the debtor's property is removed from his possession by seizure on execution, he should not be held to any further liability under the judgment, and the plaintiff's remedy, for failure of actual satisfaction, is against the sheriff or his deputy.[142] At any rate, a levy under an execution upon sufficient personalty to satisfy the same is a satisfaction of the judgment at least so far as to discharge third persons who are liable collaterally or as sureties therefor, and the release of the property from the levy thus made, without the consent of the parties so liable, cannot revive their liability.[143]

§ 1008. Satisfaction by Levy is not Absolute.

The better doctrine, and the one now generally accepted, is that a levy of execution upon sufficient personal property of the debtor to discharge the judgment is to be considered as no more than a prima facie satisfaction, or satisfaction sub modo, and that the presumption arising therefrom is liable to be rebutted, on the part of the plaintiff, by evidence of any one of a number of combinations of circumstances which, without his own fault or the sheriff's, prevented the levy from furnishing actual satisfaction of the judgment.[144] As stated by the

[141] Clark v. Withers, 1 Salk. 323; Slie v. Finch, 2 Rolle, 57; Speake v. Richards, Hob. 206; Campbell v. Pope, Hempst. 271, Fed. Cas. No. 2,365a; Jackson v. Bowen, 7 Cow. (N. Y.) 13; Shepard v. Rowe, 14 Wend. (N. Y.) 260; Hunt v. Breading, 12 Serg. & R. (Pa.) 37, 14 Am. Dec. 665; Cathcart's Appeal, 13 Pa. 421; Marshall v. Morris, 13 Ga. 185; Campbell v. Spence, 4 Ala. 543, 39 Am. Dec. 301; Young v. Read, 3 Yerg. (Tenn.) 296; Cass v. Adams, 3 Ohio, 223; Frank v. Brasket, 44 Ind. 92; Burr v. Mendenhall, 80 Ind. 49; Smith v. Hughes, 24 Ill. 270; Martin v. Charter, 27 Ill. 294; Trigg v. Harris, 49 Mo. 176; Blair v. Caldwell, 3 Mo. 353; People v. Chisholm, 8 Cal. 29; Barber v. Reynolds, 44 Cal. 519.

[142] Hunt v. Breading, 12 Serg. & R. (Pa.) 37, 14 Am. Dec. 665.

[143] Mulford v. Estudillo, 23 Cal. 94.

[144] United States v. Dashiel, 3 Wall. 688, 18 L. Ed. 268; Smith v. Condon,

court in New York: "There are some old cases in which dicta are found that a levy upon sufficient property to satisfy an execution is a satisfaction, but that doctrine has long since been exploded. Where a sheriff levies upon sufficient property, and through his negligence or misconduct it is lost, destroyed, or otherwise disposed of, so that the defendant is deprived of the benefit of it, there is no doubt it should be regarded as a satisfaction of the execution, and the plaintiff must in such case seek his remedy against the sheriff. But where the debtor has neither paid the debt nor been deprived of his property, the simple act of levying upon it is not a satisfaction, whether the debtor has been permitted to retain the property either by his own misconduct, or by his request, or the voluntary act of the officer, because neither works any wrong to him." [145] This rule, as will be seen, is sustained by the greater weight of authority, and in some states it has been established by overruling the cases sustaining the earlier doctrine. But the conflict of authority is more apparent than real, for the cases holding the strict rule generally concur in admitting certain exceptions, the effect of which is practically to reduce it to the form above enunciated. Important consequences may be deduced from the rule as it stands at present. For example, it is no defense to an action on a judgment that an execution has been issued and levied on the defendant's property to a sufficient amount to

174 Mass. 550, 55 N. E. 324, 75 Am. St. Rep. 372; Folsom v. Chesley, 2 N. H. 432; McBride v. Farmers' Bank, 28 Barb. (N. Y.) 476; Denvrey v. Fox, 22 Barb. (N. Y.) 522; People v. Hopson, 1 Denio (N. Y.) 574; Voorhees v. Gros, 3 How. Prac. (N. Y.) 262; Green v. Burke, 23 Wend. (N. Y.) 490; Peck v. Tiffany, 2 N. Y. 451; Lyon v. Hampton, 20 Pa. 46; Carr v. Weld, 19 N. J. Eq. 319; Banta v. McClennan, 14 N. J. Eq. 120; In re King, 13 N. C. 341, 21 Am. Dec. 335; Peay v. Fleming, 2 Hill Eq. (S. C.) 97; Lewis v. Spann, 1 Rich. Law (S. C.) 429; McElwee v. Jeffreys, 7 S. C. 228; Foster v. Rutherford, 20 Ga. 676; Chisolm v. Chittenden, 45 Ga. 213; Overby v. Hart, 68 Ga. 493; Walker v. McDowell, 4 Smedes & M. (Miss.) 118, 43 Am. Dec. 476; McNutt v. Wilcox, Freem. Ch. (Miss.) 116; Wade v. Watt, 41 Miss. 248; Shelton v. Hamilton, 23 Miss. 496, 57 Am. Dec. 149; McGiniss v. Lillard's Ex'r, 4 Bibb (Ky.) 490; Curtis v. Root, 28 Ill. 367; French v. Snyder, 30 Ill. 343, 83 Am. Dec. 193; Trenary v. Cheever, 48 Ill. 28; Lucas v. Cassaday, 2 G. Greene (Iowa) 208; First Nat. Bank v. Rogers, 13 Minn. 407 (Gil. 376), 97 Am. Dec. 239; Bennett v. McGrade, 15 Minn. 132 (Gil. 99); Murray v. Meade, 5 Wash. St. 693, 32 Pac. 780.

[145] Peck v. Tiffany, 2 N. Y. 451, 456.

discharge the judgment.[146] The presumption of satisfaction arising from such a levy may be rebutted by proof that actual satisfaction was not received through the insufficiency of the proceeds of the levy.[147] It may also be rebutted by proof that satisfaction could not have resulted from the levy on account of senior executions or other prior liens.[148] So again, it may be rebutted by proof that the property was removed from the plaintiff's possession by process of law.[149] Again, where the chattels levied on are abandoned and left in the debtor's possession, or restored to him at his request or for his benefit, no satisfaction of the judgment can be presumed to ensue.[150] Thus where the debtor, on a levy, gives a note with collaterals, and thereupon goods seized, and which would have been sufficient, are restored, and he promises to pay the note out of a particular fund, but makes default, the judgment is not to be considered as satisfied.[151] But it must be remembered that such a levy is at least so far a satisfaction of the judgment as to throw upon the plaintiff the burden of proving either that it was insufficient, or that its proceeds

[146] Waddell v. Elmendorf, 5 Denio (N. Y.) 447.

[147] Newsom v. McLendon, 6 Ga. 392; Caudle v. Dare, 7 Ark. 46; Moody v. Harper, 28 Miss. 615; Bibb v. Jones, 7 How. (Miss.) 397; McNutt v. Wilcox, Freem. Ch. (Miss.) 116; Chandler v. Higgins, 109 Ill. 602.

[148] People v. Hopson, 1 Denio (N. Y.) 574; Hanness v. Bonnell, 23 N. J. Law, 159; Newsom v. McLendon, 6 Ga. 392; Horn v. Ross, 20 Ga. 210, 65 Am. Dec. 621; Peay v. Fleming, 2 Hill Eq. (S. C.) 97; Cornelius v. Burford, 28 Tex. 202, 91 Am. Dec. 309.

[149] Bean v. Seyfert, 12 Phila. 224; Banks v. Evans, 10 Smedes & M. (Miss.) 35, 48 Am. Dec. 734; Alexander v. Polk, 39 Miss. 737; Peoria Savings, L. & T. Co. v. Elder, 165 Ill. 55, 45 N. E. 1083.

[150] United States v. Dashiel, 3 Wall. 688, 18 L. Ed. 268; Churchill v. Warren, 2 N. H. 298, 9 Am. Dec. 73; Ostrander v. Walter, 2 Hill (N. Y.) 329; Peck v. Tiffany, 2 N. Y. 451; Cummin's Appeal, 9 Watts & S. (Pa.) 73; Sasscer v. Walker's Ex'rs, 5 Gill & J. (Md.) 102, 25 Am. Dec. 272; Foster v. Crawford (C. C.) 80 Fed. 991; Lustfield v. Ball, 103 Mich. 17, 61 N. W. 339; Binford v. Alston, 15 N. C. 351; Stone v. Tucker, 2 Bailey (S. C.) 495; Morton v. Walker, 7 How. (Miss.) 554; Cornelius v. Burford, 28 Tex. 202, 91 Am. Dec. 309; Allen v. Johnson, 4 J. J. Marsh. (Ky.) 235; Williams v. Bowdon, 1 Swan (Tenn.) 282; Trapnall v. Richardson, 13 Ark. 543, 58 Am. Dec. 338; Biscoe v. Sandefur, 14 Ark. 568; Williams v. Boyce, 11 Mo. 537; Young v. Cleveland, 33 Mo. 126, 82 Am. Dec. 155; First Nat. Bank v. Rogers, 15 Minn. 381 (Gil. 305); Wright v. Young, 6 Or. 87.

[151] Holbrook v. Champlin, 1 Hoff. Ch. (N. Y.) 148. And see First Nat. Bank of Hastings v. Rogers, 15 Minn. 381 (Gil. 305).

were applied to the extinguishment of prior liens, or that it was otherwise unproductive, and made so without fault in the plaintiff or the levying officer.[152]

§ 1009. Release of Property on Forthcoming Bond.

In several of the states it is provided by statute that where property levied on is surrendered on a forthcoming bond, and the bond is forfeited, a new judgment, on the bond, thereupon springs into existence, without any further formalities and by mere force of the statute; and accordingly it is held that the original judgment is merged in the statutory judgment and thereby satisfied and extinguished.[153] But in some other states, where the mere forfeiture of the forthcoming bond gives an inchoate right to take judgment, but does not amount to an actual judgment of itself, it is held that such forfeiture will not operate as a merger and satisfaction of the original judgment.[154] In Pennsylvania, when an execution is levied on personal property, but the sale is prevented by an interpleader issue at the instance of a claimant who gives bonds and to whom the property is thereupon surrendered by the sheriff, the levy cannot be regarded as a satisfaction of the judgment.[155]

§ 1010. Sale on Execution.

Where property of the debtor is sold on execution, and the sale is not annulled or set aside, the judgment is satisfied to the extent of the net proceeds of the sale.[156] And where the property is pur-

[152] Newsom v. McLendon, 6 Ga. 392. See, also, First Nat. Bank of Hastings v. Rogers, 13 Minn. 407 (Gil. 376), 97 Am. Dec. 239.

[153] Witherspoon v. Spring, 3 How. (Miss.) 60, 32 Am. Dec. 310; Bank of United States v. Patton, 5 How. (Miss.) 200, 35 Am. Dec. 428; Davis v. Hoopes, 33 Miss. 173 (compare Benton v. Crowder, 7 Smedes & M. [Miss.] 185); Kelly v. Garvin, 12 Ark. 613; Frazier v. McQueen, 20 Ark. 68; Douglas v. Twembly, 25 Ark. 124; Lipscomb v. Grace, 26 Ark. 231, 7 Am. Rep. 607; Harrison v. Wilson, 2 A. K. Marsh. (Ky.) 547; Young v. Read, 3 Yerg. (Tenn.) 296. See, also, Hoyt v. Hudson, 12 Johns. (N. Y.) 207; Taylor v. Hulme, 4 Watts & S. (Pa.) 407; Cox v. Reed, 27 Ill. 434.

[154] Cole v. Robertson, 6 Tex. 356, 55 Am. Dec. 784; Patton v. Hamner, 33 Ala. 307; Crawford v. State Bank, 5 Ala. 55.

[155] Rice v. Groff, 58 Pa. 116.

[156] Halcombe v. Loudermilk, 48 N. C. 491; Knight v. Church, 73 Hun, 314,

chased by the judgment-plaintiff himself, for the amount due him, the judgment is wholly extinguished.[157] So where money is realized on an execution sufficient to satisfy the judgment and returned into court, but by agreement of parties is withdrawn and deposited in a bank, which becomes insolvent, the judgment is satisfied.[158] But the possession of money by the sheriff, arising from the sale of lands, sufficient to satisfy a judgment earlier than that under which the sale was made, is not per se a satisfaction of such earlier judgment. The prior judgment-creditor may waive his priority in favor of a subsequent one, without working an extinguishment of his judgment, which may be satisfied out of any other land originally bound by it.[159] And conversely, the redemption by a junior judgment-creditor of lands sold on execution, is not a satisfaction of his judgment either in law or equity, although the premises to which he acquires title by such redemption are worth more than the amount paid by him to redeem the same from the original purchaser at the sheriff's sale.[160] If the sale was invalid, the question is different. The invalidity may have been caused by defects or irregularities in the process or in the advertisement, uncertainty in the description of the property, or other similar causes. It is generally held, in such a case, that where the plaintiff is compelled to return the property or account for its proceeds, the court will entertain his motion to set aside the satisfaction and issue a new execution.[161] But if the invalidity of the sale is attributable to the fact that the debtor had no title or interest whatever in the property sold, the more approved doctrine appears to be that, where the creditor himself purchases the property, the judgment is finally and irrevocably satisfied and the law courts have no power to set it aside or grant him relief.[162] But this doctrine, it must be

26 N. Y. Supp. 423; Washburn v. Osgood, 38 Neb. 804, 57 N. W. 529; Shainwald v. Lewis (D. C.) 46 Fed. 839.

157 Kleinhenz v. Phelps, 6 Hun (N. Y.) 568.

158 Cake v. Bird (Pa.) 15 Atl. 774; Jones v. Schmidt, 55 N. J. Law. 504, 27 Atl. 902.

159 Bank of Pennsylvania v. Winger, 1 Rawle (Pa.) 295, 18 Am. Dec. 633.

160 Van Horne v. McLaren, 8 Paige, 285, 35 Am. Dec. 685.

161 Townsend v. Smith, 20 Tex. 465, 70 Am. Dec. 400; Smith v. Reed, 52 Cal. 345; Gooch v. Atkins, 14 Mass. 379; Farmer v. Sasseen, 63 Iowa, 110, 18 N. W. 714; Arnold v. Fuller's Heirs, 1 Ohio, 458.

162 Thomas v. Glazener, 90 Ala. 537, 8 South. 153, 24 Am. St. Rep. 830;

admitted, is opposed by a very respectable body of authorities.[163] And however it may be at law, the courts of equity will relieve a creditor from the consequences of his purchase at such an invalid sale.[164]

§ 1011. Taking Defendant on Ca. Sa.

The arrest and imprisonment of the defendant on a writ of capias ad satisfaciendum is a satisfaction of the judgment against him in such a sense that, while such imprisonment lasts, no proceedings can be taken against his property.[165] But in case of a judgment against several joint debtors, the arrest of one does not preclude the subsequent taking of the others.[166]

§ 1012. Discharge of Defendant from Custody.

At common law, the discharge of the defendant from custody under a ca. sa., by the voluntary act of the plaintiff, operated in law as an absolute satisfaction of the judgment.[167] So where a plaintiff recovered separate judgments against two joint trespassers, and sued out execution on one of the judgments, under which the defendant was committed to prison, and afterwards the assignee of both judgments gave a written direction to the sheriff to discharge the defendant in custody, it was held that the judgment against the other defendant was thereby also discharged, and the remedy upon both

Beall v. Price, 13 Ohio, 368, 383, 42 Am. Dec. 204; Hollister v. Dillon, 4 Ohio St. 197; Halcombe v. Loudermilk, 48 N. C. 491; Freeman v. Caldwell, 10 Watts (Pa.) 10; Lansing v. Quackenbush, 5 Cow. (N. Y.) 38.

163 Cross v. Zane, 47 Cal. 602; Scherr v. Himmelmann, 53 Cal. 312; Adams v. Smith, 5 Cow. (N. Y.) 280; Ritter v. Henshaw, 7 Iowa, 98; Tudor v. Taylor, 26 Vt. 444.

164 Warner v. Helm, 1 Gilman (Ill.) 220; Henry v. Keys, 5 Sneed (Tenn.) 489; Muir v. Craig, 3 Blackf. (Ind.) 293, 25 Am. Dec. 111; Price v. Boyd, 1 Dana (Ky.) 436.

165 Bank of Beloit v. Beale, 7 Bosw. (N. Y.) 611; Fassett v. Tallmadge, 15 Abb. Prac. (N. Y.) 205.

166 Penn v. Remsen, 24 How. Prac. (N. Y.) 503; Raymond v. Butterworth, 139 Mass. 471, 1 N. E. 126. See, also, Kasson v. People, 44 Barb. (N. Y.) 347; Chapman v. Hatt, 11 Wend. (N. Y.) 41.

167 Cattlin v. Kernot, 3 C. B. (N. S.) 796; Bonesteel v. Garlinghouse, 60 Barb. (N. Y.) 338; King v. Goodwin, 16 Mass. 63.

judgments was gone.[168] But the rigor of this rule has been relaxed in various states by statutes or judicial decisions. And it is now held that further proceedings upon the judgment are not precluded if the defendant regains his liberty by an escape,[169] or by the act of the law,[170] or by a discharge under the insolvent laws,[171] or by reason of the plaintiff's refusing to pay the prison fees.[172] And in at least one state, by statute, no discharge of a debtor from imprisonment on an execution, by the creditor's consent or otherwise, operates to discharge the debt or the judgment on which the execution issued.[173]

§ 1013. Cumulative Judgments.

It is held that a judgment is not satisfied by the recovery of another judgment in another court in an action brought upon the first judgment; to extinguish the first judgment, the second judgment must in fact be satisfied.[174] But if judgments founded upon the same cause of action are recovered against the same defendant in several different states, a payment of one of them is a satisfaction of all.[175] The payment by a sheriff of a judgment recovered against himself, for his failure to make the money on an execution, is not a satisfaction of the original judgment, unless the defendant adopts the pay-

[168] Kasson v. People, 44 Barb. (N. Y.) 349. Compare Hoyle v. McCrea, 42 App. Div. 629, 59 N. Y. Supp. 202.

[169] Coburn v. Palmer, 10 Cush. (Mass.) 273.

[170] Bonesteel v. Garlinghouse, 60 Barb. (N. Y.) 338.

[171] Owen v. Glover, 2 Cranch C. C. 578, Fed. Cas. No. 10,630; Strode v. Broadwell, 36 Ill. 419.

[172] Prentiss v. Hinton, 6 Blackf. (Ind.) 35; Hidden v. Saunders, 2 R. I. 391; Nardin v. Battle, 3 East. 87; Lambert v. Wiltshire, 144 Ill. 517, 33 N. E. 538. Per contra, Strawsine v. Salisbury, 75 Mich. 542, 42 N. W. 966.

[173] Abbott v. Osgood, 38 N. H. 280.

[174] Mumford v. Stocker, 1 Cow. (N. Y.) 178; Griswold v. Hill, 2 Paine, 492, Fed. Cas. No. 5,836. See Lawton v. Perry, 40 S. C. 255, 18 S. E. 861. But a second judgment recovered on the same debt, though for a less amount than that recovered in the first action, is a waiver of the remainder, and works an entire extinguishment of the first judgment. Price v. First Nat. Bank, 62 Kan. 735, 64 Pac. 637, 84 Am. St. Rep. 419. And see Wheelock v. Godfrey (Cal.) 35 Pac. 315.

[175] Tarver v. Rankin, 3 Ga. 210. And generally, where a person pursues different remedies for the same wrong, and satisfies one judgment, such satisfaction extinguishes all judgments rendered therefor. Barth v. Loeffelholtz, 108 Wis. 562, 84 N. W. 846.

ment and insists upon it as a satisfaction of the judgment against himself.[176] Where a judgment is obtained against a defendant in an attachment, and afterwards a judgment for the whole amount is rendered in the same suit against the garnishee, the latter judgment does not extinguish the former.[177]

PART VI. ENTRY OF SATISFACTION ON THE RECORD.

§ 1014. Entry of Satisfaction when Ordered.

When a judgment is fully paid, and the plaintiff, upon application of the defendant, refuses to acknowledge satisfaction, the court will compel him to enter satisfaction at his own expense and to pay the costs of the motion for that purpose.[178] But satisfaction of a judgment cannot be ordered to be entered because of any matter accruing before its rendition.[179] And if the judgment is regular on its face, and the facts concerning payment are controverted, the court should not order an entry of satisfaction without awarding an issue.[180] Nor will the court order such entry unless all the parties interested are brought before it and have an opportunity to be heard.[181] Neither should the court entertain jurisdiction of such a motion as to any of the parties, unless it is to be a satisfaction entirely and to all.[182] In some of the states, by statute, penalties are provided against a judgment-creditor who neglects or refuses to satisfy a judgment of record when the same has been paid, within a certain period after being

[176] Poe v. Dorrah, 20 Ala. 288, 56 Am. Dec. 196.

[177] Price v. Higgins, 1 Litt. (Ky.) 273.

[178] Briggs v. Thompson, 20 Johns. (N. Y.) 294; Medford v. Dorsey, 2 Wash. C. C. 467, Fed. Cas. No. 9,390; Jones v. Schmidt, 55 N. J. Law, 504, 27 Atl. 902; Foreman v. Bibb, 65 N. C. 128; Reid v. O'Brien, 86 Ill. App. 128; Manker v. Sine, 47 Neb. 736, 66 N. W. 840.

[179] Jarman v. Saunders, 64 N. C. 367; Hawkins v. Harding, 35 Ill. App. 25.

[180] McCutcheon v. Allen, 96 Pa. 319; Atkinson v. Harrison, 153 Pa. 472, 26 Atl. 294. Satisfaction will not be ordered except upon perfectly clear and conclusive proof of payment. Third Nat. Bank v. Hunsicker, 8 Pa. Co. Ct. R. 635; Shaylor v. Parsons, 1 Pa. Super. Ct. 281; Barker v. Crawford, 58 Hun, 604, 11 N. Y. Supp. 337.

[181] In re Beers, 5 Rob. (N. Y.) 643; Mayer v. Sparks, 3 Kan. App. 602, 45 Pac. 249.

[182] Long v. Shackleford, 25 Miss. 559.

requested to do so. But it is held that it must be shown that he was personally requested to enter satisfaction; a request made to the attorney who conducted the suit for the plaintiff is insufficient.[183] But where it is made the duty of the prothonotary or clerk of court to enter satisfaction when the return to a writ shows that the money was made, the judgment creditor is not liable for a failure of that officer to enter satisfaction where there is such a return.[184] Independently of such statutes, an action of trespass on the case will lie against a judgment creditor for refusal or neglect, after he has received full payment of his judgment, to satisfy the judgment of record within a reasonable time, upon being duly requested thereto.[185] In Pennsylvania, also, a statute empowers the court itself to enter satisfaction of a judgment on due proof that it has been fully paid. But this, being in derogation of the common law, must be restricted to the very case of actual payment in full. Not everything which could be given in evidence under the plea of payment in a pending adversary proceeding before judgment may be treated as actual payment after verdict and judgment.[186] An action to obtain satisfaction on the record of a judgment which has been paid is not barred by the fact that the person claiming benefits under the judgment has had it assigned to him more than six years before the action was brought.[187] And where a motion to discharge a judgment of record as having been satisfied was overruled on hearing, the adjudication is conclusive, as to the satisfaction, in a subsequent application to revive the judgment, the same having become dormant.[188]

§ 1015. Nature and Effect of Entry.

The satisfaction of a judgment is prima facie evidence of payment or a gift; its legal effect is the extinguishment of the debt.[189] But it is said that an entry of satisfaction, indorsed on the judgment, is in

[183] Marston v. Tryon, 108 Pa. 270.

[184] Bratton v. Leyrer, 12 Pa. Co. Ct. R. 651.

[185] McLaughlin v. First Nat. Bank, 72 Ill. App. 476.

[186] Felt v. Cook, 95 Pa. 247; Riddle's Appeal, 104 Pa. 171; Anderson v. Best, 176 Pa. 498, 35 Atl. 194.

[187] Wilson v. Brookshire, 126 Ind. 497, 25 N. E. 131, 9 L. R. A. 792.

[188] Broadwater v. Foxworthy, 57 Neb. 406, 77 N. W. 1103.

[189] Kerr's Appeal, 104 Pa. 282; Packard v. Hill, 7 Cow. (N. Y.) 434.

the nature of a receipt for the amount thereof, and may be explained, qualified, controlled, or even contradicted by parol evidence.[190] An entry on the docket of the filing of a receipt of part of the sum due on a judgment against two, in full of the whole judgment against one, is not a legal entry of satisfaction, nor is it a release of the judgment.[191] In a case in Pennsylvania, it appeared that execution was issued on a judgment, and the defendant tendered the debt, interest, and costs to the plaintiff, and then obtained a rule why he should not be allowed to pay the same to the sheriff in full satisfaction of the judgment. The rule was made absolute and the sheriff returned the execution "stayed by order of court." It was held that this amounted to no more than an inferential satisfaction of the judgment, as it would not be clear and sufficient notice to one searching the title that the lien of the judgment was discharged.[192]

§ 1016. Striking Off Mistaken or Fraudulent Entry.

If an entry of satisfaction of a judgment be made upon the record by mistake, by fraud, or by falsely personating the plaintiff, the court where the record is has an undoubted right, upon proof of the facts and notice to the parties, to strike off such improper entry.[193] So a plaintiff whose judgment is entered satisfied by an attorney

[190] Stewart v. Armel, 62 Ind. 593. A satisfaction piece, signed by the judgment creditor, but placed in his desk without delivery to the judgment debtor or to any one for him, is not effectual to discharge the judgment. Earley v. St. Patrick's Church Soc., 81 Hun, 369, 30 N. Y. Supp. 979. So, also, an unfiled order of the court declaring a judgment to be satisfied is of no more effect than an order for judgment, and is not admissible as evidence of a satisfaction. Hall v. Sauntry, 80 Minn. 348, 83 N. W. 156.

[191] Campbell v. Booth, 8 Md. 107.

[192] Allen v. Conrad, 51 Pa. 487.

[193] Russell v. Nelson, 99 N. Y. 119, 1 N. E. 314; Gilpin v. Baltimore & O. R. Co. (Com. Pl.) 17 N. Y. Supp. 520; Murphy v. Flood, 2 Grant, Cas. (Pa.) 411; Bowman v. Forney, 15 Pa. Co. Ct. R. 134; Paul v. Eurich, 3 Pa. Super. Ct. 299; Delta Building & Loan Ass'n v. McClune, 6 Pa. Dist. R. 569; City of Philadelphia v. Simon, 12 Pa. Super. Ct. 159; Ackerman v. Ackerman, 44 N. J. Law, 173; Bradshaw v. Bratton, 96 Va. 577, 32 S. E. 56; Armstrong v. Harper, 65 Ala. 523; State v. Young, 32 Kan. 292, 4 Pac. 309; Bogle v. Bloom, 36 Kan. 512, 13 Pac. 793; McNeal v. Hunt, 6 Kan. App. 670, 50 Pac. 63; Wilson v. Stilwell, 14 Ohio St. 464; Kerr v. Kerr, 81 Ill. App. 35; Cohen v. Camp, 46 Mo. 179. Compare Romain v. Garth, 5 Thomp. & C. (N. Y.) 361. The cir-

who had no authority to make the entry may maintain an action or application to have the entry cancelled.[194] Where an entry of satisfaction of a judgment is made under an agreement, and the defendant fails to perform the conditions of the agreement, the plaintiff is entitled to an order vacating the entry and placing the judgment in statu quo.[195] And where the judgment-creditor wrongfully applies funds realized from collateral security to the payment of his judgment, the entry of satisfaction will be stricken off and the defendant admitted to a defense.[196] While summary proceedings upon motion are generally available for the purpose of procuring the cancellation of a fraudulent or mistaken entry of satisfaction, yet it is held that if there is conflicting evidence upon the material questions of fact, the court should not make its determination upon mere ex parte affidavits, but should put the party to a regular action.[197] Where a

cuit court of one county cannot annul an unauthorized satisfaction of a judgment entered in the docket kept by the clerk of the circuit court in another county. Burney v. Hunter, 32 Ill. App. 441. But see, per contra, Darrow v. Darrow, 43 Iowa, 411.

[194] Freeman v. Paul, 105 Ind. 451, 5 N. E. 754; Voell v. Kelly, 64 Wis. 504, 25 N. W. 536; Turnan v. Temke, 84 Ill. 286; Moore v. Cairo & F. R. Co., 36 Ark. 262; Faughnan v. City of Elizabeth, 58 N. J. Law, 309, 33 Atl. 212; Maxfield v. Carr, 8 Kulp (Pa.) 214. But the appearance of an attorney in a case and the satisfaction of the judgment by him are presumed to be by the authority of the client; and such a satisfaction will not be stricken off, years afterwards, when the attorney is dead, on the ground of his want of authority in the premises. Miller v. Preston, 154 Pa. 63, 25 Atl. 1041. And where a client is informed that his attorney has satisfied on the record a judgment in his favor, and accepted securities for a part thereof, and does not then disavow the attorney's act, and such attorney afterwards sues on such securities in the name and with the assent of the client, the latter cannot then repudiate the satisfaction of the judgment and have it stricken off. Whitesell v. Peck, 165 Pa. 571, 30 Atl. 933.

[195] Stuart v. Peay, 21 Ark. 117. The satisfaction of a judgment on a settlement between the parties cannot be rescinded for fraud in the procurement of the settlement, except on condition that plaintiff shall return to defendant whatever he has received pursuant to the settlement; and it is not a sufficient substitute for such return that the court, in setting aside the judgment, has ordered that the amount paid pursuant thereto shall be deducted from the existing judgment or any final judgment recovered in the action. Lee v. Vacuum Oil Co., 126 N. Y. 579, 27 N. E. 1018.

[196] Guthrie v. Reid, 107 Pa. 251. See, also, Geissinger's Appeal (Pa.) 4 Atl. 344.

[197] Chapman v. Blakeman, 31 Kan. 684, 3 Pac. 277. See, also, Dwight v.

judgment-debtor gives a new obligation for the claim to the plaintiff, who thereupon marks the judgment satisfied, at the request of the debtor, the latter cannot have the satisfaction stricken off, and the judgment opened, on the ground that the original transaction was usurious.[198]

§ 1017. Release and Discharge of Judgment.

A parol release of a judgment is sufficient in equity, but a consideration is necessary to support it; it is not enough that it is in writing, if without a consideration.[199] An attorney at law has no power, except by special authority from his client, to release the client's judgment, where the judgment has not been paid or satisfied.[200] Where a judgment-debtor obtains possession of a discharge of the judgment, without a compliance with the conditions on which it was to be delivered, and the discharge is not filed with the clerk, nor satisfaction entered on the record, the judgment remains in full force.[201]

St. John, 25 N. Y. 203; Yeates v. Mead, 65 Miss. 89, 3 South. 651; Barrett v. Lingle, 33 Ill. App. 650.

[198] Read's Appeal, 126 Pa. 415, 17 Atl. 621.

[199] Whitehill v. Wilson, 3 Pen. & W. (Pa.) 405, 24 Am. Dec. 326. See Davis v. Bowker, 1 Nev. 487. The holder of a judgment lien cannot release land of his debtor, taken on execution on a junior judgment, so as to preserve his lien for its full amount against other land of the debtor, where the debtor files a refusal to accept the release. Fisler v. Stewart, 191 Pa. 323, 43 Atl. 396, 71 Am. St. Rep. 769.

[200] Rounsaville v. Hazen, 33 Kan. 71, 5 Pac. 422.

[201] Crosby v. Wood, 6 N. Y. 369.

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